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No.

In The

Supreme Court of the United States

October Term, 1981

DALLAS COUNTY HOSPITAL DISTRICT,
Petitioner,

vs.

DALLAS ASSOCIATION OF COMMUNITY ORGANIZATIONS FOR REFORM NOW, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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ISSUES PRESENTED

I.

WHETHER A HOSPITAL OWNED AND OPERATED BY A GOVERNMENTAL SUBDIVISION FOR THE SOLE PURPOSE OF TREATING HUMAN ILLS, IS A PUBLIC FORUM AVAILABLE TO MEMBERS OF THE GENERAL PUBLIC TO EXERCISE THEIR RIGHTS UNDER THE FIRST AMENDMENT.

II.

WHETHER PETITIONER'S "NO SOLICITATION" RULE REGULATING SOLICITATION ON HOSPITAL PROPERTY VIOLATES THE FIRST AMENDMENT.

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Your Petitioner[1] respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of appeals for the Fifth Circuit, entered in the above cause on March 19, 1982, rehearing en banc and panel rehearing denied June 18, 1982.

[1]Petitioner, Dallas County Hospital District, (the District) is a political subdivision of the State of Texas created under Art. 4494n, Tex.Rev.Civ.Stat.Ann., to provide medical and hospital care to the medically indigent and needy persons residing in Dallas County, Texas, as well as to provide medical and hospital care to paying patients who need such care. The District owns and operates Parkland Memorial Hospital (Parkland).

OPINIONS BELOW

The majority opinion and the dissent of the United States Court of Appeals for the Fifth Circuit on rehearing were filed March 19, 1982, and are reported at 670 F.2d 629 (5th Cir. 1982), modifying prior opinion, affirming in part and reversing in part and remanding to District Court. A copy of the opinion is included in Appendix A., together with the Judgment dated March 19, 1982.

A copy of the Panel Opinion of the Fifth Circuit filed September 25, 1981, which was modified on rehearing, is included in Appendix B.

The Judgment of the United States District Court for the Northern District of Texas, Dallas Division, filed November 9, 1979, reported in 478 F.Supp. 1250, is included in Appendix C.

The Order of the United States Court of Appeals for the Fifth Circuit filed June 18, 1982, denying panel rehearing and suggestion of rehearing en banc is included in Appendix D.

The Order of the United States Court of Appeals for the Fifth Circuit filed August 9, 1982, granting motion to recall and stay the issuance of the mandate is included in Appendix E.

GROUNDS FOR JURISDICTION

The Judgment sought to be reviewed was entered by the United States Court of Appeals for the Fifth Circuit on March 19, 1982, and is reported at 670 F.2d 629. Petitioner's motion for rehearing and suggestion for rehearing en banc were denied on June 18, 1982. This petition for certiorari was filed within ninety days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment to the Constitution of the United States
Art. 4494n, V.A.T.S.

STATEMENT OF THE CASE

The original complaint in this case was filed by Dallas Association of Community Organizations for Reform Now, Leon Gowans, and Scott Holladay, Respondents, in January, 1979, seeking injunctive relief from the enforcement of Petitioner's "no solicitation" policy, which prohibited Respondents from solicitations (handing out leaflets) on the Parkland Hospital premises.

Petitioner's answer asserted that Parkland Hospital was not a public forum and that the no solicitation policy properly prohibits Respondents from solicitations on Hospital premises without prior written approval of the Hospital Administrator. Petitioner further answered that other suitable alternative forums for conducting the solicitations were available to Respondents.

Parkland Hospital, one of the major hospitals in Dallas County, has facilities for emergency care, inpatient hospital care and outpatient care. (R. 110-P, 136)[2]. Many services are available at Parkland that are not available in other hospitals, such as a nationally known Burn Center. Therefore, Parkland attracts and serves many patients who can

[2]R. refers to the Record.

pay a portion or all of the costs of the medical and hospital services received by personal payment, insurance, Medicare, Medicaid, or other means. Former President John F. Kennedy was among those brought to Parkland as an emergency case. (R. 110-B, 110-C).

The hospital complex is surrounded by busy public streets. The vehicular access to the hospital is limited to three entrances. (A fourth entrance in the rear is to the emergency room). There is a patient parking lot on the grounds of the hospital, and a public parking lot across the street. Those patients who do not arrive by cars or taxis generally come by bus. There are three bus stops located on city property adjacent to the hospital. (R. 137). The hospital has three entrances for patients — the front lobby entrance for most patients being admitted to the hospital, the Outpatient Clinic entrance on the side for outpatients, and the Emergency Room entrance in the rear. ("A": 73-74)[3].

The Outpatient Clinic is a five story annex to the main part of the hospital. The clinic provides medical care to patients who are ambulatory, which usually means that they are well enough to walk in, receive care, and walk out. A majority of the patients served in the clinic are indigent. The clinic now treats many more patients than it was designed to accommodate; it is always extremely crowded. The clinic was designed for 400 patients a day; in 1978, the facility averaged 906 patients a day. Since the clinic was built in 1958, the number of patients treated there has increased on an average of 10% per year. A 1978 study projected future demand for the clinic and recommended a new ten story building to replace the current facility. (R. 136 & 146).

[3] "A" refers to the Transcripts of Proceedings.

The Outpatient Clinic has two entrances on the first floor, one from the front lobby and one from the outside. The heart of the first floor of the clinic is a small lobby, which contains an information desk on one side and the cashiers and prescription counters on the other side. Branching off the lobby are halls leading to the Triage Clinic, which diagnoses walk-in patients (those without appointments) and directs them to the appropriate area of the hospital, to the pharmacy, which has a large and crowded waiting room, to the Administrative Offices of the clinic and to the other portions of the hospital. At the end of the lobby opposite the entrance are the stairs and elevators providing access to the other floors of the clinic. The ground floor of the clinic contains numerous treatment rooms, a couple of small waiting areas and connecting hallways. The second, third, and fourth floors consist basically of a larger central waiting room surrounded by examination and treatment rooms. (R. 136; Def. Ex. 7-4 contains diagrams of the floor plans for the Outpatient Clinic.)

Health care personnel sometimes use the waiting rooms for activities related to patient care. These activities include teaching patients, counselling families, taking patient histories, and administering medication and I.V.'s. On rare occasions when the treatment rooms are full, some medical treatment, like drawing blood, occurs in the clinic waiting rooms. More commonly, the clinic waiting rooms, because of their size, are used for teaching patients. For example, instructions to diabetic patients are given in the clinic waiting rooms weekly. There are also classes in the clinic waiting rooms for obstetrics and cardiac patients. (R. 136).

The Respondents are Dallas Association of Community Organizations for Reform Now (ACORN), Scott Holladay, a prior Dallas Regional Organizer hired by the staff director

of ACORN in Little Rock, Arkansas, to organize activities in the Dallas area, and Leon Gowans, chairman of a neighborhood group affiliated with ACORN. (R. 110-A, 137). ACORN is an organization of low to moderate income families which operates through neighborhood groups to promote social and economic change. Families may become members in ACORN by paying membership dues which, to the extent available, are used to pay the salaries of ACORN staff personnel and other expenses. (R. 110-A, 137).

In 1967, the Board of Managers of the District adopted the no solicitation rule which is challenged in this suit. The rule states:

> "For the protection of our employees and patients, solicitation of any kind on hospital premises is prohibited without prior written approval of the Hospital Administrator."

The purpose of the no solicitation rule is to protect patients, their families and employees from potentially disruptive influences unrelated to the health care function of the hospital. Other hospitals have similar no solicitation rules. ("A". 166). Those hospitals with similar rules include Presbyterian and Baylor in Dallas and Massachusetts General.

The Board and the Administration interpret the no solicitation rule to prohibit distribution of literature on hospital property both inside and outside the buildings. (R. 113, 138). Since the adoption of the rule, no Administrator has approved the distribution of leaflets or pamphlets by any outside group. (R. 138).

The hospital Administration and staff believe that distribution of literature not related to health care would be disruptive and incompatible with the hospital's health care function. (R. 138).

On Saturday, September 2, 1978, approximately 45 ACORN members and staff attempted to stage a demonstration in the main lobby of the hospital without obtaining the approval of the Administrator. The demonstration was covered by two television stations, which had been notified in advance by ACORN that it would conduct the demonstration. (R. 110-C). While in the lobby, the ACORN group completely blocked the front entrance and no one could get through, thereby hindering the people trying to get out of the hospitl. ("A" 279, 304). An Administrator of the hospital requested that they leave and they did so. (R. 138).

On Monday, September 11, 1978, approximately six to eight ACORN members and staff entered the Outpatient Clinic and attempted to distribute leaflets, which implied that decent health care was not provided at Parkland, to people in the waiting rooms throughout the clinic. (R. 113, 139). The ACORN members were asked to leave by an Administrator and did so. (R. 138). However, before they left, one member of the group berated a secretary in a belligerent fashion and shook his finger in the face of the assistant director of the clinic and threatened to sue her. He acted in a very disruptive manner. ("A." 252, 254).

ACORN has demanded that it be allowed to distribute leaflets on the premises of Parkland without obtaining the approval of the Administrator. ACORN never submitted any materials to the Administrator for approval for distribution. (R. 114).

On November 8, 1979, the United States District Court for the Northern District of Texas, Dallas Division, held that Parkland Hospital is not a public forum for First Amendment activities and Respondents do not have a con-

stitutional right to solicit or to distribute leaflets at Parkland. In a footnote, the Court noted that:

> "The Board of Managers of the Defendant (Parkland) hold its monthly meetings at Parkland. The meetings are open to the public and members of the public, including plaintiffs, currently appear and speak. Nothing in this opinion is to be construed as affecting the open meeting policy of the Board." 478 F. Supp. 1250, at 1252-1253.

Unit A of the United States Court of Appeals for the Fifth Circuit on September 25, 1981, unanimously affirmed the trial court's opinion, holding that:

> " . . . the conditions at Parkland warrant the implementation of time, place and manner restrictions on First Amendment activity in even the nonpatient care areas of the hospital and outpatient clinic areas which might in a different hospital not interfere with the functions of providing care to the sick and injured." 656 F.2d 1175, 1180.

Referring to ACORN, the Court further held that:

> " . . . we do not find that it has shown a lack of suitable alternative forums for conducting its solicitations." 656 F.2d 1175, 1180.

On motion for rehearing, a majority of the Panel modified the prior opinion, affirmed in part and reversed and remanded in part, holding that:

> "We reverse both the District Court's finding that Parkland is not a public forum and its holding that Parkland's 'no solicitation rule' is constitutional." 670 F.2d 629, 633.

Judge Coleman dissented, noting that in the absence of a Supreme Court decision to the contrary, ". . . I would hold

that a hospital — designed, constructed and operated for the sole purpose of treating human ills — is not a public forum." 670 F.2d 629, 633.

Petitioner's motion for rehearing and rehearing en banc was denied June 18, 1982. (Appendix D). Petitioner's motion to stay was granted on August 9, 1982. (Appendix E).

REASONS FOR GRANTING WRIT

1. The Supreme Court of the United States should resolve the conflict existing in lower courts on whether a hospital, owned and operated by a governmental subdivision for the sole purpose of treating human ills, is a public forum.

2. The United States Court of Appeals for the Fifth Circuit erroneously reversed the district court holding that Petitioner's no solicitation rule regulating solicitation on hospital premises violates the First Amendment.

1. THE SUPREME COURT OF THE UNITED STATES SHOULD RESOLVE THE CONFLICT EXISTING IN LOWER COURTS ON WHETHER A HOSPITAL, OWNED AND OPERATED BY A GOVERNMENTAL SUBDIVISION FOR THE SOLE PURPOSE OF TREATING HUMAN ILLS, IS A PUBLIC FORUM.

Judge Coleman's dissenting opinion in the case at bar[4] would hold that a hospital — designed, constructed, and operated for the sole purpose of treating human ills — is not a public forum. The District Court held that Parkland Hospital is not a public forum for First Amendment activities and Respondents do not have a constitutional right to solicit or to distribute leaflets at Parkland.[5] This Court has made

[4] 670 F.2d 633, 634.

[5] 478 F.Supp. at 1252.

it clear that public property is not a public forum simply because it is publicly owned and has affirmed that the State, like a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated. *Adderley v. State of Florida*, 385 U.S. at 47, 87 S.Ct. at 247.

The District Court in the case at bar noted that recent Supreme Court cases support a three step approach for analyzing freedom of speech cases.[6] The District Court noted that the steps are:

> (1) First determine if the activity is the type of speech protected by the First Amendment. If the activity is protected speech, the Court must next decide
>
> (2) Whether the proposed forum is a public forum; that is, whether it is an appropriate forum for the speech. If the Court concludes that the proposed forum is not a public forum, the analysis stops there. If the Court concludes that the area is a public forum, then
>
> (3) It must then balance First Amendment rights against the interest of the State in regulating the speech.

The District Court acknowledged that such an analytical framework is overlaid with well established principles of First Amendment law, including presumption against prior restraints, First Amendment guarantees are not absolute, and that a person does not have a constitutional right to speak whenever and however and wherever he or she pleases, citing *Adderley v. Florida*, 385 U.S. 39, 48, 87 S.Ct. 242, 17 L.Ed.2d 149 (1966); *Greer v. Spock*, 424 U.S. at 836, 96 S.Ct. 1211 (1976).

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[6] 478 F.Supp. 1250, at 1255 (1979)

After applying the three step analysis to the case at bar, the District Court concluded that ACORN's leafleting at Parkland Hospital is the kind of activity protected by the First Amendment and that if the activity took place in a traditional public forum, there would be no question of its propriety. The District Court noted that the question of whether or not Parkland Hospital is a public forum is decisive of the case and is one of first impression. After noting the importance of public ownership and public admittance, the District Court held that a place is not a public forum simply because it is publicly owned or because the public is permitted to be there and cited *Greer v. Spock*, supra, and *Adderley v. Florida*, supra.

The District Court considered both the historical test, as well as the realistic test (discussed by Justice Powell in the concurring opinion), and concluded that:

> "In the light of these cases, this Court concludes that a public hospital is not a public forum. There is no evidence in the record, and the Court can conceive of none, to show that a hospital has historically been a forum for any kind of protected speech. In fact, it is part of our history to regard the hospital as a haven sheltered from outside noise and activities." 478 F.Supp. 1250, at 1257.

The District Court further held that the realistic test likewise supports this conclusion and that:

> "Quality health care requires there be no impediment to the speed with which it is given and no disturbing influences on the patients. There is 'basic incompatibility' between leafleting in the public areas of a hospital and the rendition of health care." Id. 1257.

The Panel majority opinion held that the Board of the Hospital "...may not completely forbid freedom of speech on the Hospital grounds." 670 F.2d 629, at 632. However, the

Panel held this to be true only because the Hospital was held to be a public forum. When publicly owned property is not a public forum, the public has no right to exercise First Amendment guarantees on such property. See *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 97 S.Ct. 2532 (1977); *Greer v. Spock*, 424 U.S. at 838, 96 S.Ct. at 1217; *Lehman v. City of Shaker Heights*, 418 U.S. 298, 94 S.Ct. 2714 (1974); *Hudgens v. N.L.R.B.*, 424 U.S. at 520, 96 S.Ct. at 1036. Thus, the central issue of this case is whether a publicly owned hospital is a public forum for the exercise of First Amendment rights.

The public forum doctrine originates in the lead opinion of Justice Roberts in *Hague v. Committee for Industrial Organization*, 307 U.S. 496, 515, 59 S.Ct. 954, 964 (1939):

> "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens."

Respondents acknowledged in their brief in the Court of Appeals (page 10) that the areas of Parkland to which they seek access "have not traditionally been considered as public forums." Respondents, ignoring the "historical test" which was proposed by Judge Roberts in *Hague v. Committee for Industrial Organization*, supra, contended that "the realistic test as proposed in *Grayned v. City of Rockford*, 408 U.S. 104, 92 S.Ct. 2294 (1972), should be decisive of the public forum question." The Supreme Court of the United States emphasized the importance of the historical test in *Lehman v. City of Shaker Heights*, supra, and held that:

> "The truth is that open spaces and public places differ very much in their character, and before you could say whether a certain thing could be done in a certain place, you would have to know the history of the particular place." 418 U.S. at 302, 94 S.Ct. at 2717.

In *Greer v. Spock*, supra, the majority clearly opted for the historic test.

> "The notion that federal military reservations, like municipal streets and parks, have traditionally served as a place for free public assembly and communication of thoughts by private citizens is thus historically and constitutionally false." 424 U.S. at 838, 96 S.Ct. at 1217.

Similarly, in *Jones v. North Carolina Prisoners' Labor Union, Inc.*, the Court stated, "A prison may be no more easily converted into a public forum than a military base." 97 S.Ct. at 2543. Thus, the Court affirmed that the historic test used in *Greer v. Spock* was the appropriate test to be used.

There is no historical basis for a notion that hospitals have traditionally served as a place for free public assembly and communication of thoughts by private citizens as is the case with municipal streets and parks. In describing public places that are not public forums, courts have specified hospitals, jails, and military bases. *United States v. Douglas*, 579 F.2d 545, 549, (9th Cir. 1978); *Chicago Area Military Project v. City of Chicago*, 508 F.2d 921, 925 (7th Cir. 1975); *ISKON v. Schrader*, 461 F.Supp. 714 (N.D. Tex. 1978); *Persons for Free Speech at SAC v. United States Air Force*, 675 F.2d 1010 (8th Cir. 1982).

The Court in *Persons for Free Speech at SAC*, supra, noted that:

> "The Supreme Court has rested its 'public forum' analysis on considerations of historical and traditional

uses of the relevant government property. See *United States Postal Service v. Council of Greenburgh Civic Associations*, 453 U.S. 114, 117-120, 101 S.Ct. 2676, 2679, 69 L.Ed.2d 517 (1981) (mail boxes); *Greer v. Spock*, supra, 424 U.S. at 838, 96 S.Ct. at 1217 (military base); *Adderley v. Florida*, 385 U.S. 39, 41, 87 S.Ct. 242, 244, 17 L.Ed.2d 149 (1966) (jail). The question, therefore, is whether the open house is such a deviation from the historical and traditional uses of OAFB so as to create a public forum. We hold it is not." 675 F.2d at 1015.

Historically, hospitals have been regarded as havens to be sheltered from outside noises and activities. The historical restriction on hospital premises is also illustrated by hospital associations recommending that hospitals have rules prohibiting all solicitations and distribution of any type of literature by non-employees at any time on hospital premises. 11A Hospital Law Manual, Labor (update June 1979). Other hospitals, both locally and nationally, have no solicitation rules similar to that of the District. ACORN presented no evidence of any hospital making itself available as a public forum.

Respondents take a similar position to the position taken by the Court of Appeals in the *Spock* case, supra, where it held that military authorities could not prevent Dr. Spock and other persons from entering Fort Dix for the purpose of making political speeches or distributing leaflets in those areas of Fort Dix generally open to the public. The Court of Appeals based its decision on *Flower v. United States*, 407 U.S. 197, 92 S.Ct. 1842 (1972). The *Greer v. Spock* majority held that the *Flower* decision was based upon an understanding that Fort Sam Houston had abandoned any special claim to New Braunfels Avenue, which was a public thoroughfare in San Antonio no different from all the other public thoroughfares throughout the city. Therefore, the

Flower decision was held to have been merely an application of the rule stated by Justice Roberts in *Hague v. CIO*, 307 U.S. at 515-16, 59 S.Ct. 954.

The *Greer v. Spock* majority specifically rejected the concept of the Court of Appeals, which is advanced by ACORN in this case.

> "The Court of Appeals was mistaken, therefore, in thinking that the *Flower* case is to be understood as announcing a new principle of constitutional law, and mistaken specifically in thinking that *Flower* stands for the principle that whenever members of the public are permitted freely to visit a place owned or operated by the Government, then that place becomes a 'public forum' for the purposes of the First Amendment. Such a principle of constitutional law has never existed, and does not exist now." 424 U.S. at 836, 96 S.Ct. at 1216.

Since even ACORN admits (although the Court of Appeals held otherwise), that a hospital is not historically a public forum, it seeks to draw the Court's attention away from the guidelines set forth in *Greer v. Spock* by arguing that the appropriate test is provided by the following sentence from *Grayned v. City of Rockford*. "The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." 408 U.S. at 116, 92 S.Ct. at 2303. However, ACORN fails to appreciate the context of the situation when the Supreme Court made this statement in *Grayned*. The Supreme Court has frequently held that even when people seek to use a public forum to exercise their First Amendment rights, that use may be reasonably regulated as to time and place and manner. In *Grayned*, the Supreme Court was not considering whether to extend the reaches of the public forum doctrine to a place which had not historically been

a public forum. Instead, the *Grayned* opinion concerned whether the use of a city sidewalk, an historic public forum, should be limited because it was adjacent to a public school. Seen in that context, it is evident that the *Grayned* opinion does not establish a contrary test to that used by the Supreme Court in the later *Greer v. Spock* decision, but rather is an expression of the limitations that may be placed upon the use of public forums.

Moreover, even if one assumes in arguendo that the realistic test is a permissible alternative to the historic test, a hospital would still not be a public forum.

The purpose and primary activity of Parkland is rendering quality health care. (R. 142, "A" 232). Quality health care requires that there be no impediment to the speed with which the health care is given and no disturbing influences on the patients. The district court found that there is a basic incompatibility between leafleting in the public areas of the hospital and the rendition of health care. This incompatibility was found to arise both from the type of First Amendment activity — physical distribution of leaflets — and the possible detrimental effect on patients from the contents of the leaflets. Even the psychologist called by ACORN admitted that handing out leaflets could hinder the operation and efficiency of the hospital. ("A" 342).

Dr. Charles Mullins testified ("A" 127) there is an extremely high volume of traffic on the Hospital grounds with continuous traffic congestion that complicates the entire issue of trying to deliver health care and decrease waiting times. Dr. Mullins, a cardiologist, further stated that persons on the parking lot may have abnormal cardiac rhythm and literally a few seconds or a few minutes may be critical in getting the patient to the proper areas to be cared for. "And

if we congest those even worse, I think that is detrimental to health care." Dr. Mullins stated that on the 23 acres in addition to the many buildings, there are 3,200 employees and 500 doctors on the premises every day in addition to 2,000 patients and up to another 2,000 relatives of patients. He, therefore, was of the opinion that leafleting should not be permitted on the congested grounds of the Hospital.

This Court has referred to the need of hospitals to provide a tranquil atmosphere for patients. This recognition by the Supreme Court is best summed up by the following statement in *NLRB v. Baptist Hospital*, 99 S.Ct. at 2604n12.

> "12. Mr. Justice Blackmun has commented perceptively on the importance of maintaining a peaceful and relaxed atmosphere within hospitals.
>
> "'Hospitals, after all, are not factories or mines or assembly plants. They are hospitals, where human ailments are treated, where patients and relatives alike often are under emotional strain and worry, where pleasing and comforting patients are principal facets of the day's activity, and where the patient and his family — irrespective of whether that patient and that family are labor or management oriented — need a restful, uncluttered, relaxing, and helpful atmosphere, rather than one remindful of the tensions of the marketplace in addition to the tensions of the sick bed.' *Beth Israel Hospital v. NLRB*, supra, 437 U.S. at 509, 98 S.Ct. at 2478 (Blackmun, J. concurring)."

The *Baptist Hospital* case, supra, and *Beth Israel Hospital* case, supra, are instructive in demonstrating the atmosphere that should be provided for patients but they do not involve the constitutional guarantee of free expression. The rights and liabilities of the parties in those cases are dependent exclusively upon the National Labor Relations Act. This was made clear by the Supreme Court in an earlier decision in

Hudgens v. NLRB, 424 U.S. 507, 521, 96 S.Ct. 1029, 1037 (1976), where the Court stated, "we conclude, in short, that under the present state of the law the constitutional guarantee of free expression has no part to play in a case such as this. From what has been said, it follows that the rights and liabilities of the parties in this case are dependent exclusively upon the National Labor Relations Act."

It is obvious that the necessity to provide a tranquil atmosphere to patients recognized by the Supreme Court in these cases is totally incompatible with the concept of the public forum inviting conflict, anxiety and even anger.

Dicta in several cases supports the conclusion that a public hospital is not a public forum for First Amendment activity. The Supreme Court in *Lehman v. City of Shaker Heights*, 418 U.S. at 304, 94 S.Ct. at 2718, stated that the Constitution does not require that display cases in public hospitals become public forums open to every would be pamphleteer and politician. In *Grayned v. City of Rockford*, 408 U.S. 121n49, 92 S.Ct. at 2306, this Court stated "in *Tinker* we noted that 'a school is not like a hospital or a jail enclosure.'" Several lower courts have also specified hospitals in describing places that are not public forums. See *United States v. Douglas*, 579 F.2d 545, 549 (9th Cir. 1978); *Chicago Area Military Project v. City of Chicago*, 508 F.2d 921, 925 (7th Cir. 1975); *ISKON v. Schrader*, 461 F.Supp. 714, 718 (N.D.Tex. 1978).

Another case indicating that hospitals are not public forums is *Clifford v. Moritz*, 472 F.Supp. 1094 (S.D. Oh. 1979). Ohio MH-MR, a state agency which ran thirty-three hospitals throughout the state, had adopted a policy which permitted some but not all non-employee union organizers access to hospital grounds for the purpose of union solicitation in non-work areas. A union organizer not permitted

access to hospital grounds under the Ohio MH-MR policy brought suit claiming that the policy and its allegedly discriminatory application constituted an abridgement of his rights secured by due process and equal protection clauses of the Fourteenth Amendment. The court noted that unlike the sheriff in *Adderley v. Florida*, Ohio MH-MR did not seek to wholly prevent the use of hospital grounds for the exercise of protected expression by non-employees, rather it adopted a rule allowing some non-employees to engage in that activity, while prohibiting other non-employees from doing so. The court ruled that such a selective exclusion from a public place required a substantial if not compelling justification, which it did not find in that instance. However, the court went on to state that Ohio MH-MR "could bar non-employee solicitation altogether." 472 F.Supp. at 1100. Thus, the court recognized that a public hospital was not a public forum, but if a public entity opens the hospital up as a limited public forum, it must do so on a non-discriminatory basis.

In his concurring opinion in *Lehman v. City of Shaker Heights*, 418 U.S. at 305, 94 S.Ct. at 2718, Justice Douglas states that in his opinion the right of the commuters to be free from forced intrusion on their privacy "precludes the city from transforming its vehicles of public transportation into forums for the dissemination of ideas upon its captive audience." Id. at 307, 94 S.Ct. at 2719. He concludes that the petitioner does not have any constitutional right to spread his message before this captive audience. If Lehman had no constitutional right to place his political placards in city buses due to the captive audience of its passengers, surely ACORN has no constitutional right to accost the captive audience of patients waiting for medical services at Parkland, nor to confront them on the hospital grounds and

add to the congestion which already exists at the hospital facility. If, therefore, Parkland is not a public forum, ACORN and its members have no right to access for the purpose of leafleting as distinguished from the purposes for which the premises were intended. *Persons for Free Speech at SAC v. United States Air Force*, supra.

Historically, hospitals have been operated under the same type policy that Parkland has. Dr. Charles Mullins testified ("A" 167-168) that he had been associated with other hospitals, including the one at Hickman Air Force Base in Hawaii and that, although they permitted magazines, newspapers and books on the premises, they each prohibited general solicitation.

This decision by the Panel of the United States Court of Appeals for the Fifth Circuit is the first case to hold that a hospital is a public forum. In order to prevent irreparable damage to our health care institutions, this Court should grant the petition for a writ of certiorari to the said United States Court of Appeals for the Fifth Circuit.

2. THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT ERRONEOUSLY REVERSED THE DISTRICT COURT HOLDING THAT PETITIONER'S NO SOLICITATION RULE REGULATING SOLICITATION ON HOSPITAL PREMISES VIOLATES THE FIRST AMENDMENT.

If Parkland is not a public forum, the no solicitation rule is clearly constitutional. *Greer v. Spock*, supra. Under the facts of this case, the rule is valid under the time, place and manner rule. The problem at Parkland was well summarized by Dr. Charles Mullins as follows:

> "...We consider that once a patient enters the property of Parkland hospital, that the patient is under our care

and we have to consider that patient's health needs, and these are both psychological and physical, of course. We have an extremely high volume of traffic and poor parking facilities at the moment, as you well know, and continuous traffic congestion, and I think adding to that simply complicates the entire issue of trying to deliver health care and decrease waiting times." ("A" 127).

As noted by the Court of Appeals, Parkland complex has three entrances for patients and is surrounded by busy public streets with vehicular traffic limited to three entrances with three bus stops located on city property adjacent to the hospital. 656 F.2d at 1176. ACORN could have stationed someone at each of these positions on city property and could have thereby reached every person that comes to Parkland. They could have also reached them by mail by securing a list from the hospital.

The Court of Appeals Panel in its first opinion found that, under these facts, "We determine that the conditions at Parkland warrant the implementation of time, place and manner restrictions on First Amendment activity in even the non-patient care areas of the hospital and outpatient areas which might in a different hospital not interfere with the functions of providing care to the sick and injured." 656 F.2d at 1180.

As pointed out by Judge Coleman in his dissent on rehearing, the prior opinion was limited to its facts and need not be extended beyond the actual issue in the case. He further stated that:

"Overworked, understaffed personnel of hospitals should not have their mission diverted by such stumbling blocks. No real First Amendment right is promoted by allowing it. The privacy of and a reasonably tranquil atmosphere for sick people, and the efforts to help them

if not always to cure them, ought not to be hampered by the necessity for specially tailored handling, which may survive the hair splitting analysis fostered by litigation. Let all propagandizers, of whatever purpose or ilk, stand clear of the last refuge of the sick." 670 F.2d at 633-634.

The access from City property was a reasonable alternative. First Amendment guarantees, however fundamental, are not absolute.

> "The guarantees of the First Amendment have never meant 'that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please.' *Adderley v. Florida*, 385 U.S. 39, 48, 87 S.Ct. 242, 247, 17 L.Ed.2d 149, 156." *Greer v. Spock*, 424 U.S. 828, 836, 96 S.Ct. 1211, 1216-17 (1976); see also *Cox v. State of Louisiana*, 379 U.S. 536, 554, 85 S.Ct. 453, 464 (1965).

There are times when First Amendment values must yield to other societal interests, *Metromedia, Inc. v. City of San Diego*, 101 S.Ct. 2282 (1981), and the facts show a rational basis for the rule.

The alternative access available at all Parkland entrances is better access than was approved (a single booth on fairgrounds) in *Heffron v. International Society for Krishna Consciousness*, 101 S.Ct. 2559 (1981).

The majority Panel on rehearing in the case at bar referred in a footnote to *NLRB v. Baptist Hospital*, 442 U.S. 773, 99 S.Ct. 2598 (1979), regarding *union* solicitation in a hospital. Other cases have come before the United States Supreme Court in the context of hospitals and union solicitation, most notably *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 98 S.Ct. 2463 (1978) and *NLRB v. Baylor University Medical Center*,

439 U.S. 9, 99 S.Ct. 299 (1978). None of these cases was concerned with First Amendment rights. Statutory rights were involved in each of those cases and they were decided exclusively upon the National Labor Relations Act and did not even discuss the First Amendment or the public forum issue. The Panel reliance on such cases was misguided. This distinction was made clear by the Supreme Court in an earlier decision in *Hudgens v. NLRB*, 424 U.S. 507, 96 S.Ct. 1029 (1976), where the Court stated:

> "We conclude in short that under the present state of the law the constitutional guarantee of free expression has no part to play in a case such as this. From what has been said, it follows that the rights and liabilities of the parties in this case are dependent exclusively upon the National Labor Relations Act."

The Supreme Court has recognized a need to limit even those specific statutory rights when a hospital is involved even though it is employees who are to be solicited and not patients as in the case at bar. *NLRB v. Baptist Hospital*, supra.

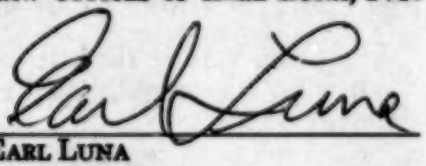
Therefore, while these NLRB cases are instructive in showing the sheltered atmosphere that needs to be provided to patients, they do not involve the constitutional guarantee of free expression, nor do they consider the issue of whether a hospital is a public forum.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

LAW OFFICES OF EARL LUNA, P.C.



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ATTORNEYS FOR PETITIONER

PROOF OF SERVICE

THE STATE OF TEXAS }
COUNTY OF DALLAS }

BEFORE ME, the undersigned Notary Public in and for Dallas County, Texas, on this day personally appeared EARL LUNA, who being by me duly sworn, upon oath stated: I, EARL LUNA, am a member of the Bar of the Supreme Court of the United States and have been the attorney of record for petitioner herein in all proceedings in which they have been involved in the Courts below.

I further state upon oath that upon the 14th day of September, 1982, I served copies of the foregoing Petition for Writ of Certiorari on the Respondents by depositing the same in the United States Mail, with first class postage prepaid, addressed to the following counsel of record in the Courts below, at the address indicated, to-wit: Mr. Roger Albright, Mullinax, Wells, Baab & Cloutman, P.C., Suite 200, 8204 Elmbrook, Dallas, Texas 75247.

Earl Luna
EARL LUNA

SUBSCRIBED, AND SWORN TO before me by the said Earl Luna, this the 14th day of September, 1982.

Notary Public, Dallas County, Texas

DALLAS ASSOCIATION OF COMMUNITY ORGANIZATIONS FOR REFORM NOW, et al.,

Plaintiffs-Appellants,

v.

DALLAS COUNTY HOSPITAL DISTRICT,
Defendant-Appellee.

No. 79-3967.

United States Court of Appeals,
Fifth Circuit.*
Unit A

March 19, 1982.

Organization of low to moderate income families created to promote social and economic changes brought action challenging, on First Amendment grounds, public hospital's "no solicitation rule." The United States District Court for the Northern District of Texas, Barefoot Sanders, Jr., J., entered judgment for defendant, 478 F.Supp. 1250, and the Court of Appeals affirmed at 656 F.2d 1175. On petition for rehearing en banc, the Court of Appeals held that hospital's "no solicitation rule" was unconstitutional because hospital administration could not forbid the distribution of literature, based on its content, throughout entire hospital area and could not delegate unfettered discretion to administrator to interpret the rule by making his own decision about acceptability of content of the literature, and rule was also overbroad in that it potentially reached and restricted every single mode of expression, including pure speech.

Affirmed in part and reversed and remanded in part; motion for rehearing denied.

Coleman, Circuit Judge, dissented and filed opinion.

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*Former Fifth Circuit case, Section 9(1) of Public Law 96-452 — October 14, 1980.

1. Constitutional Law — 90.1(4)

Hospital's "no solicitation rule" was unconstitutional because hospital administration could not forbid the distribution of literature, based on its content, throughout entire hospital area and could not delegate unfettered discretion to administrator to interpret the rule by making his own decision about acceptability of content of the literature, and rule was also overbroad in that it potentially reached and restricted every single mode of expression, including pure speech; a proper rule would define by objective standards literature that is forbidden because of potential interference with hospital's administration and would contain time, place, and manner and guidelines. U.S.C.A.Const.Amend. 1.

2. Constitutional Law — 90.1(4)

The First Amendment is violated by unreasonable and unequal restrictions on access to public property, as well as by delegation authority to a single person to determine who may use public property for free speech. U.S.C.A.Const. Amend. 1.

3. Constitutional Law — 90(3)

A rule acceptable under the First Amendment would prevent only those expressions that are basically incompatible with normal activity of a particular place at a particular Tex., for plaintiffs-appellants.

Roger Albright, Dallas Legal Services Fdn., Inc., Dallas, Tex., for plaintffs-appellants.

Mary F. Keller, American Civil Liberties Foundation of Texas, Inc., Austin, Tex., amicus curiae for Texas Civil Liberties Union.

Robert L. Schwartz, Chicago, Ill., amicus curiae for American Hospital Ass'n.

Earl Luna, Dallas, Tex., Thomas V. Murto, III, for defendant appellee.

Appeal from the United States District Court for the Northern District of Texas.

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Before BROWN, COLEMAN and GEE, Circuit Judges.

PER CURIAM:

On petition for rehearing en banc, the Dallas Association of Community Organizations for Reform Now (ACORN) has challenged our opinion, 656 F.2d 1175 (5th Cir. 1981), in which we declined to reach the question of the constitutionality of the "no solicitation" rule. The facts in this dispute are adequately set forth in that opinion. Upon reconsidering the matter, and for the reasons set forth below, we modify that opinion, vacate our affirmance of the District Court's, 478 F.Supp. 1250, holding, and reverse and remand on that issue. We now hold that the District Court should pass on the constitutionality of that rule in light of the principles discussed in the remainder of this opinion.

The Supreme Court recently reaffirmed that activities protected by the First Amendment "are subject to reasonable time, place, and manner restrictions." *Heffron v. International Society for Krishna Consciousness, Inc.*, — U.S.—, —, 101 S.Ct. 2559, 2563, 69 L.Ed.2d 298, 306 (1981). Although the District Court found that Parkland Hospital is not a public forum, 478 F.Supp. at 1257, we held that a hospital owned by the state is a public forum but one whose use may be limited by the state by reasonable restrictions.[1] Obviously, regulations must exist so that the primary purpose of a medical facility may be fulfilled and not impeded, but such restrictions must be both reasonable and not based on

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[1]The Supreme Court, in *N. L. R. B. v Baptist Hospital, Inc.*, 442 U.S. 773, 787-88, 99 S.Ct. 2598, 2606-07, 61 L.Ed.2d 251, 264-65 (1979), stated that "solicitation in at least some of the public areas of hospital often will not adversely affect patient care or disturb patients."

content.[3] Our concern in the present controversy has been and remains the necessity of preventing disruptive activity in the crowded front lobby of Parkland, the waiting room, the outpatent clinic, and the emergency treatment area, as well as any other area for patient treatment. However, we also recognize that Parkland's premises cover 23 acres, including over 1,000 feet of sidewalks and several large parking lots. Thus we must attempt to find the middle way between absolute prohibition of free speech activities in a limited

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[3]In the context of hospital regulations, some writers might find the "not based on content standard" "both theoretically questionable and difficult to apply." *See* Redish, *The Content Distinction in First Amendment Analysis*, 34 Stan.L.Rev. 113 (1981). This difficulty arises out of a commingling of two concepts. The hospital may adopt non-content-related restrictions, tempered by reasonable time, place, and manner rules. If it seeks *in addition* to impose restrictions based on content, the regulations are governed by different standards. "A regulation that regulates only the time, place or manner of speech may be imposed so long as it's reasonable. But when regulation is based on the content of speech, governmental action must be scrutinized more carefully to ensure that communication has not been prohibited 'merely because public officials disapprove the speaker's views.' " *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 535-36, 100 S.Ct. 2326, 2332, 65 L.Ed.2d 319, 326-27 (1980) (quoting *Niemotko v. Maryland*, 340 U.S. 268, 282, 71 S.Ct. 325, 333, 95 L.9d. 267, 280 (1951) (Frankfurter, J., concurring in the result)).

Thus, a hospital might adopt a regulation prohibiting the distribution in patient's rooms of literature that exclaimed in pejorative terms that the surgeons are "butchers trying to kill patients." In such a case, the medical need to protect patients from emotional disturbance might warrant some content regulation, for "[e]ven within the area of protected speech, a difference in content may require a different governmental response." *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 66, 96 S.Ct. 2440, 2450, 49 L.Ed. 2d 310, 323-24 (1976) (plurality opinion). The central question would be " 'whether the manner [and, we add, content] of expression is basically incompatible with the normal activity of a particular place at a particular time.' " *Greer v. Spock*, 424 U.S. 828, 843, 96 S.Ct. 1211, 1220, 47 L.Ed.2d 505, 517-18 (Powell, J., concurring) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 116, 92 S.Ct. 2294, 2303, 33 L.Ed.2d 222, 232 (1972)); *see id.* at 840, 96 S.Ct. at 1218, 47 L.Ed.2d at 515 (majority opinion).

public forum, and disruptive expressions that interfere with the purpose, function and administration of a hospital.

[1] The troublesome "no solicitation rule" applied by Parkland administrators to prevent ACORN from distributing their literature prohibits "solicitation of any kind" on Parkland's premises "without prior written approval of the hospital administration." Neither the hospital board nor the administrator has adopted any rules concerning the conditions on which approval may be granted or withheld, nor have any guidelines been established as to what types of literature may or may not be distributed. Testimony by the administrator indicated that newspapers and pamphlets from groups other than ACORN are permitted to be placed in the hospital on the basis that they are unlikely to cause anxiety to patients when sold in various parts of the hospital or placed in a reading rack in the outpatient waiting room. Upon reconsideration of this rule, we find that it is unconstitutional because (i) the hospital administration cannot forbid the distribution of literature, based on its content, throughout the entire hospital area, and (ii) the hospital administration cannot delegate unfettered discretion to the administrator to interpret the rule by making his own decision about the acceptability of the content of the literature.[3]

[2] We reaffirm the principle that the board of a hospital, operating public property devoted to a particular purpose, may adopt rules to preserve the property for the use for which it is lawfully dedicated, but they may not completely forbid freedom of expression on the hospital grounds. The Supreme Court, in *Consolidated Edison Company v. Public Service Commission*, 447 U.S. 530, 535, 536, 100 S.Ct. 2326, 2332, 65 L.Ed.2d 319, 326, 327 (1980),

> recognized the validity of reasonable time, place, or manner regulations that serve a significant governmental

[3] Such "discretion has the potential for becomming a means of suppressing a particular point of view." *Heffron v. International Society for Krishna Consciousness, Inc.*, ... U.S. ....., ..., 101 S.Ct. 2559, 2564, 69 L.Ed.2d 298, 307 (1981).

> interest and leave ample alternative channels for communication. . . . Thus, the essence of time, place, or manner regulation lies in the recognition that various methods of speech, regardless of their content, may frustrate legitimate government goals. No matter what its message, a roving soundtrack that blares at 2 a.m. disturbs neighborhood tranquility.

The First Amendment is violated by unreasonable and unequal restrictions on access to public property, as well as by the delegation of authority to a single person to determine who may use public property for free speech. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51, 89 S.Ct. 935, 938-39, 22 L.Ed.2d 162, 167 (1969).

[3] What may be forbidden is expression that interferes with the functioning of the hospital. An acceptable rule would prevent only those expressions that are basically incompatible with the normal activity of a particular place at a particular time. *See Greer v. Spock*, 424 U.S. 828, 838, 96 S.Ct. 1211, 1220, 47 L.Ed.2d 505, 514 (1976).

We hold that the rules at Parkland with regard to solicitation or leafletting must define by objective standards the literature that is forbidden because of the potential interference with the hospital's administration. Parkland need not allow disruption of the hospital or interference with patient care — by proper rules, with fixed standards, such disruption can be forbidden.[4] The present rule, however, which contains no time, place, and manner guidelines, and which is applied by the hospital administrator at his discretion, must be held unconstitutional.

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[4] A hospital such as Parkland "may serve its legitimate interests, but it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedom . . . 'Broad prophylactic rules in the area of free expression are suspect. Precision of regulations must be the touchstone . . . .' " *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 637, 100 S.Ct. 826, 836, 63 L.Ed.2d 73, 87-88, quoting *NAACP v. Button*, 371 U.S. 415, 438, 83 S.Ct. 328, 340, 9 L.Ed.2d 405, 421 (1963).

Given the overcrowed and congested conditions at Parkland, a precisely-drawn rule could constitutionally prohibit all solicitation and leafleting in its small and crowded front lobby, its busy outpatient clinic, and the various waiting rooms where, because of lack of space, certain necessary medical services (teaching patients, recording patient histories, taking patients' vital signs, administering medications, drawing blood, etc.) must be provided. We find that the significant governmental interest inherent in providing medical care to public justifies certain carefully drawn restrictions on freedom of expression. *United States vs. O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673, 1678, 20 L.Ed.2d 672, 680 (1968). Interference with the operation of Parkland's services need not be tolerated. *Carey v. Brown*, 447 U.S. 455, 470, 100 S.Ct. 2286, 2296, 65 L.Ed.2d 263, 276 (1980). For example, literature distributed among patients, awaiting medical care, that stated that the doctors are incompetent and will do more harm than good could quite easily cause further distributances to those already suffering ailments. On the other hand, a public hospital's rules should set forth standards that allow some freedom of expression outside patient areas, for example on the sidewalks and in the parking lots, that would cause little harm or distribuance to the hospital's operation. Thus, we are not chastising Parkland for its sensitivity to patient needs, but we are, under clearly established constitutional principles, requiring that standards must be set forth that are consistent with both patient needs and freedom of expression.[8] Moreover, some machinery for

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[8]As the Supreme Court stated in *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 2298, 2299, 33 L.Ed.2d 222, 227-28 (1972),

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined .... Vague laws may trap the innocent by not providing fair warning ... A vague law impermissibly delegates basic policy matters ... for resolution on an *ad hoc* and subjective basis with the attendant dangers of arbitrary and discriminatory application.... [Where] a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." [footnotes omitted]

review must exist so that decisions by the administration as to what areas are susceptible to disruption might be challenged.

The present "no solicitation rule" at Parkland is not vague — no solicitation at all is permitted. However, in application, it is clear that some literature is allowed on the premises of Parkland. Thus it becomes vague because those seeking to place their literature or leaflets in the waiting rooms of the hospital have no idea whether their expressions constitute "solicitation" under the "no solicitation rule".

The present "no solicitation rule" is also overbroad in that it potentially reaches and restricts every single mode of expression, including pure speech. Thus, even expressions that could in no way disrupt the purposes of the hospital could be prohibited under the rule if they were determined by the hospital administrator to constitute solicitaion.

In conclusion, we affirm the District Court's findings that (i) ACORN's activities are protected by the First Amendment, subject to reasonable time, place, and manner restrictions, and (ii) that ACORN activities including solicitation or the distribution of leaflets, are incompatible with the primary activities of all areas where patient care is being administered.* *We reverse both the District Court's finding that Parkland is not a public forum and its holding that Parkland's "no solicitation rule" is constitutional.* The case is remanded to the District Court for reconsideration and a decision in accordance with the principles set forth above. Except insofar as explicitly granted in this per curiam opinion, it is ordered that the petition for rehearing is

*ACORN recognizes that it would be inappropriate to leaflet in some areas, but insists that the more public areas, such as clinic waiting rooms, are proper forums for its activities. This abstract argument fails to take into account the overcrowded and congested conditions at Parkland. Under such circumstances, it may be necessary to provide medical care to patients even in areas originally designated as visitors' lobbies, or patients' waiting rooms. These factors must be considered in any assessment of the interference caused by solicitation or leafleting.

denied. No member of the panel nor Judge of this Administrative Unit in regular active service having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is DENIED.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

COLEMAN, Circuit Judge, dissenting.

I believe that our prior opinion in this case, which was expressly limited to its facts, correctly stated the law applicable to those facts. Therefore, I would not extend the decision beyond the actual issue in the case.

More particularly, in the absence of a Supreme Court decision to the contrary, I would hold that a hospital — designed, constructed, and operated for the sole purpose of treating human ills — is not a public forum. The overriding function of such a unique institution should not be subjected to a room to room, place by place, analysis for the promulgation of some kind of a limited rule as to those particular areas. Overworked, understaffed personnel of hospitals should not have their mission diverted by such stumbling blocks. No real First Amendment right is promoted by allowing it. The privacy of and a reasonably tranquil atmosphere for sick people, and the efforts to help them if not always to cure them, ought not to be hampered by the necessity for specially tailored handling, which may survive the hair splitting analysis fostered by litigation. Let all propagandizers, of whatever purpose or ilk, stand clear of the last refuge of the sick.

I respectfully dissent.

United States Court of Appeals

FOR THE FIFTH CIRCUIT*

October Term, 19

No. 79-3967

D. C. Docket No. CA 3-79-0055-H

DALLAS ASSOCIATION OF COMMUNITY ORGANIZATIONS FOR REFORM NOW, ET AL,

Plaintiffs-Appellants,

versus

DALLAS COUNTY HOSPITAL DISTRICT,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Texas

Before BROWN, COLEMAN and GEE, Circuit Judges.

JUDGMENT ON REHEARING

This cause came on to be heard on plaintiffs-appellants' petition for rehearing;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the opinion originally entered by this Court on September 25, 1981, is modified; and that the judgment of the said District Court appealed from is hereby affirmed in part and reversed in part; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

It is furthed ordered that each party bear their own costs on appeal in this Court.

March 19, 1982

COLEMAN, Circuit Judge, dissenting.

Issued as Mandate: June 28, 1982

*Former Fifth Circuit case, Section 9(1) of Public Law 96-452-, October 14, 1980.

B-1

DALLAS ASSOCIATION OF COMMUNITY ORGANIZTATIONS FOR REFORM NOW, ET AL.,

Plaintiffs-Appellants,

v.

DALLAS COUNTY HOSPITAL DISTRICT,

Defendant-Appellee.

No. 79-3967

United States Court of Appeals,
Fifth Circuit.
Unit A

Sept. 25, 1981.

Organization of low to moderate income families created to promote social and economic changes brought action challenging, on First Amendment grounds, public hospital's "no solicitation rule." The United States District Court for the Northern District of Texas, Barefoot Sanders, Jr., J., entered judgment for defendant, 478 F.Supp. 1250, and plaintiff appealed. The Court of Appeals, Brown, Circuit Judge, held that: (1) extremely congested conditions at public hospital warranted implementation of time, place and manner restriction on First Amendment activity in even nonpatient care areas of the hospital and out-patient clinic areas, and (2) plaintiff failed to show a lack of suitable alternative forums for conducting solicitation such as would warrant granting of relief.

Affirmed.

1. Constitutional Law — 82(6)

Extremely congested conditions at public hospital warranted implementation of time, place, and manner restrictions on First Amendment activity in even nonpatient care

areas of the hospital and out-patient clinic areas. U.S.C.A. Const. Amend. 1.

2. Constitutional Law — 90.1(1)

In action brought by organization of neighborhood groups against public hospital seeking declaratory and injunctive relief from enforcement of hospital's "no solicitation rule," the organization failed to show a lack of suitable alternative forums for conducting its solicitation such as would warrant granting of relief. U.S.C.A.Const. Amend. 1.

Roger E. Albright, Dallas Legal Services Fdn., Inc., Dallas, Tex., for plaintiffs-appellants.

Mary F. Keller, American Civil Liberties Foundation of Texas, Inc., Austin, Tex., for Texas Civil Liberties Union.

Robert L. Schwartz, Chicago, Ill., for American Hospital Assoc.

Earl Luna, Thomas V. Murto, III, Dallas, Tex., for defendant-appellee.

Appeal from the United States District Court for the Northern District of Texas.

Before BROWN, COLEMAN and GEE, Circuit Judges.

JOHN R. BROWN, Circuit Judge:

This appeal presents a constitutional issue that is not clearly controlled by prior authority. Plaintiffs, the Dallas Association of Community Organizations for Reform Now (ACORN), Scott Holladay, the past regional organizer for ACORN, and Leon Gowans, chairman of a neighborhood group affiliated with ACORN,[1] appeal the District Court's, 478 F.Supp. 1250, judgment denying them injunctive and declaratory relief and attorney's fees, and awarding court

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[1]Unless necessity dictates otherwise, plaintiffs will be referred to collectively throughout this opinion as ACORN.

costs to the defendant, Dallas County Hospital District (District), in an action brought pursuant to 42 U.S.C. § 1983, *et seq.*, as well as the First and Fourteenth Amendments.[2] ACORN contends that the District Court erred in concluding (i) that a hospital owned and operated by the District, a governmental subdivision, is not a "public forum" suitable for First Amendment leafletting, and (ii) that the hospital's "no solicitation rule" comports with freedom of speech guarantees of the Constitution. Concluding that the conditions at the hospital warrant the implementation of time, place, and manner restrictions on First Amendment activity in even the nonpatient care areas, we affirm, and do not reach the constitutionality of the "no solicitation rule."

I.

The District is a political subdivision created and operated under Tex.Rev.Civ.Stat.Ann. art. 4494n (Vernon) to provide medical and hospital care to both indigent and paying patients of Dallas County, Texas. Approximately one-half of its operating revenues derives from ad valorem taxes levied in Dallas County. Its Board of Managers, which is appointed by the Dallas County Commissioner's Court, appoints an Administrator and governs the District.

One of the major hospitals providing health care to the indigent in Dallas is Parkland Memorial Hospital, owned and operated by the District. Parkland has facilities for emergency care, inpatient hospital care, and outpatient care. It is also a teaching hospital. Many services are available at Parkland that are not available in other hospitals, such as a nationally known burn center. Consequently, in addition to the indigent of Dallas County, Parkland attracts and serves many patients who can pay a portion or all of the costs of the medical and hospital services received by personal payment, insurance, Medicare, Medicaid, or other means.

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[2] Jurisdiction is conferred by 28 U.S.C. § 1343(3).

Parkland hospital complex has three entrances for patients — the front lobby entrance for most patients being admitted to the hospital, the outpatient clinic entrance to the side, and an emergency room entrance in the rear. It is surrounded by busy public streets. Vehicular access is limited to three entrances. There is a patient parking lot on the grounds of the hospital and a public lot across the street. Those patients who do not arrive by private automobile or taxi generally come by bus. Three bus stops are located on city property adjacent to the hospital.

The outpatient clinic is a five story annex to the main part of the hospital. Of the five stories, the ground floor or basement is subterranean while floors one through four are above the earth's surface. It has two entrances on the first floor, one from the front lobby and one from the ouside. A small lobby, containing an information desk on one side and cashier and prescription distribution centers on the other, constitutes the heart of the clinic's first floor. Branching off the lobby are halls leading to (i) the triage clinic, which diagnoses walk-in patients and directs them to appropriate areas of the hospital, (ii) the pharmacy, which has a large and crowded waiting room, (iii) the administrative offices of the clinic, and (iv) other portions of the hospital. The ground floor comprises numerous examination rooms, a couple of small waiting areas, and connecting hallways. Larger central waiting rooms surrounded by examination and treatment rooms are found on the second, third, and fourth floors.

When completed in 1958, the outpatient clinic was designed to treat approximately 400 ambulatory patients a day. Since that date, the number of patients has increased on an average of ten percent each year. In 1978, the clinic averaged 906 patients a day. A study that same year projected future demand for the clinic, recommending that a new ten story building be constructed to replace the current structure.

Because of lack of space and the excessive number of patients requiring care in the outpatient clinic on a daily

basis, hospital personnel were, in 1977, instructed to refrain from using the outpatient clinic as a means of ingress to or egress from the hospital complex and have been required to utilize waiting rooms for activities related to patient care. For example, the second, third, and fourth floor waiting rooms routinely provide needed space for teaching patients such as those with diabetic or cardiac ailments, counseling families, recording patient histories, taking patient's vital signs, as well as administering oral and intravenous medications. While none of these activities take place in the waiting rooms located in the first floor lobby area of the outpatient clinic, blood is drawn in the phlebotomy room adjacent to the triage clinic on the first floor to which the public has direct access.

ACORN is an organization of low to moderate income families which operates through neighborhood groups to promote social and economic changes. Families may become members of ACORN by paying dues which, as far as they go, are used to pay the salaries of ACORN staff personnel and other expenses.

In the fall of 1978, one of the issues in which ACORN members were interested was the improvement of health care provided to low and moderate income residents of Dallas County. During this time ACORN members were attending meetings of the Board of Managers of the District and speaking to the press regarding their grievances.

On Saturday, September 2, 1978, approximately forty-five ACORN members convened in the front lobby at the main entrance to the hospital to read a statement criticizing conditions at Parkland. No prior approval had been obtained from the hospital administrator. The demonstration was covered by two television stations. Because a crowd gathered blocking the flow of traffic across the lobby to the clinics on the first floor, an administrator asked the ACORN members to leave. In doing so, the administrator relied on a "no solicitation rule" adopted by the Board of Managers of the District in 1967, which provides: "For the protection of our employees and patients, solicitation of any kind on hospital premises is

prohibited without prior written approval of the Hospital Administrator."

Ten days later, six to eight ACORN members entered the first floor of the outpatient clinic without permission and attempted to distribute two different leaflets to people in waiting rooms throughout the clinic. The leaflets identified as defective health care conditions a need for (i) neighborhood clinics, which ACORN believed the Board of Managers of the District opposed, (ii) improved waiting room conditions, (iii) reduced waiting time at Parkland, (iv) Spanish-speaking employees in the clinic, and (v) additional parking for patients and their families.[3]

Once again an administrator asked the ACORN members to leave. Before leaving, one member of the group berated a secretary in a belligerent fashion and shook his finger in the face of the assistant director of the clinic, threatening to sue her.

Following these expulsions of its members, ACORN brought this suit seeking declaratory and injunctive relief from the enforcement of Parkland's "no solicitation rule." After a bench trial, the District Court held that although ACORN's leafletting at Parkland is the kind of activity protected by the First Amendment, a public hospital is not a public forum. The court reasoned that the hospital in its entirety must be considered as an institution whose purpose

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[3]One of the leaflets, which was less controversial than the other, was two typed pages. This leaflet promoted neighborhood health clinics, criticized the Board's opposition to these clinics, and listed some of the other concerns of ACORN about Parkland. Most of the testimony at trial related to the possible detrimental effects on patients of the second leaflet. At the top of this one page leaflet is a large bold faced caption saying. "How long have you been waiting for decent health care?" Under the caption is a cartoon depicting the patient waiting area. The doctor at the door is shouting, "Next!" to the only occupant of the waiting room — a skeleton draped in a chair with cobwebs over its head. Under this graphic cartoon is a short demand for neighborhood health clinics, a notice of an ACORN meeting at Parkland, and a list of some other health care issues.

and primary normal activity is health care. Consequently, the court concluded, no part of Parkland is a public forum. Nor could the court find the "no solicitation rule," applied non-discriminately, was unconstitutional. Simply because Parkland might be the best forum for addressing a given audience, the court concluded, does not mean that it is a constitutionally protected forum. Comparing the patients at Parkland to a "captive audience," the court reasoned they would only escape ACORN's intrusions by leaving and possibly injuring their health. In reaching these conclusions, the court emphasized that its decision did not purport to deny to ACORN access to the public streets, public parking lots, or bus stops in the vicinity of the Parkland complex. *See Iskcon v. Schrader*, 461 F.Supp. 714 at 718 (N.D.Tex. 1978).

II.

The District Court's ruling that Parkland Hospital is not a "public forum" for First Amendment purposes decides an issue of first impression in this Circuit. In reaching its conclusion, the court found, applying the "historical test" of *Greer v. Spock*, 424 U.S. 828, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1975) as the exclusive measure of what is a public forum, that "[t]here is not evidence in the record, and the court can conceive of none, to show that a hospital has historically been a forum for any kind of protected speech." Then utilizing the "realistic test" of *Lehman v. City of Shaker Heights*, 418 U.S. 298, 94 S.Ct. 2714, 41 L.Ed.2d 770 (1974), the court examined the present activity in the forum before determining that "[t]here is a 'basic incompatibility" between leafletting in the public areas of a hospital and the rendition of health care." The court explained that this incompatibility arises from both the *type* of activity, physical distribution of leaflets in already overcrowded waiting areas, and the possible detrimental effects on patients from the *content* of the leaflets.

ACORN attacks these conclusions, advancing four theories why the District Court's ruling is incorrect. First, ACORN

argues that the court impermissibly considered the content of the leaflets in resolving the public forum question. Although conceding that the time, place, and manner of leafletting can be regulated, ACORN asserts that content cannot be regulated. To support this argument, ACORN emphasizes that other forms of public expression and solicitation, many critical of Parkland, are allowed in the public areas of the outpatient clinic without restriction on their manner or content.[4] On the contrary, ACORN stresses that the hospital administration admitted having no knowledge of what the literature in the waiting rooms contained or who placed it there.

Even if the leaflets' contents could permissibly be considered, ACORN asserts that there is no necessary incompatibility between the leafletting and the rendering of health care at the hospital. ACORN points to the fact that the waiting areas where it desires to distribute leaflets are open to the public, service only ambulatory patients, are entirely separate from the inpatient portion of the hospital, and thus are similar to waiting areas located in similar governmental institutions which have been held to be proper forums for First Amendment activities. *See Albany Welfare Rights Organization v. Wyman*, 493 F.2d 1319 (2d Cir. 1974). Moreover, ACORN claims the fact that Parkland allows the holding of other activities, such as Board of Managers' meetings in which issues and controversies negatively reflecting on the operation of the hospital, provides evidence that the public areas of the outpatient clinic are appropriate for, and presently used as, a public forum for the peaceful, non-disruptive exchange of information.

Third, ACORN argues that Parkland provides the best reasonable forum to reach the relevant audience, i. e., the

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[4] As examples, ACORN pointed out that newspapers, magazines, pamphlets, periodicals, military and advertising bulletins, in addition to other types of literature, are displayed in racks in the clinic waiting rooms, as well as notices on bulletin boards, posters, and other displays.

indigent patients, and that no suitable alternative exists. Although the vast majority of Parkland's patients live in identifiable sections of Dallas County, ACORN asserts it does not have the resources to canvass these patients.[5] Nor are the public streets and sidewalks around Parkland viable alternatives, ACORN argues, because it needs access to the object of the protest (the hospital) simultaneous with access to the audience (the patients), and the streets may be subject to time, place, and manner regulations necessary to further significant government interests.

As a final theory why Parkland should be regarded a "public forum," ACORN contends the Parkland patients cannot be characterized as a "captive audience." ACORN points out that no showing was made that the substantial privacy rights of persons seated in the hospital waiting areas, or walking along the sidewalks leading to the parking lots and bus stops, were being invaded in an intolerable manner. Nor was it established, ACORN submits, that any patient left the hospital because of the leafleting.

The District denies all these assertions, arguing that the District Court, in making its decision, was entitled to consider the leaflets' contents because they contained matter adverse to the hospital's mission. Primarily, however, the District concentrates on the propriety of the court's applying a "historic test" and in concluding that Parkland is not a "public forum."

The concept of a "public forum" for First Amendment purposes was originally formulated by Justice Douglas, dissenting in *Adderly v. Florida*, 385 U.S. 39, 53-55, 87 S.Ct. 242, 250-252, 17 L.Ed.2d 149, 159-61 (1966). Since that opinion the courts of this nation have determined that

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[5]ACORN argues that over two-thirds of the outpatients are scattered among Dallas County's million-plus population. In order to reach the remaining 28.64% living in three identifiable zip code zones, ACORN, basing its statistics on 1970 census figures, claims it would be forced to canvass an area of approximately 20,678 acres in search of 66,019 patients out of a total of 150,287.

streets, sidewalks, and parks,[6] schools,[7] public transportation facilities,[8] welfare office, waiting rooms,[9] and state capitol grounds[10] are "public forums" for First Amendment activities. On the other hand, jails,[11] military bases,[12] and city buses,[13] although government institutions doing the people's business, are not performing speech-related functions,[14] and are subject to reasonable time, place, and manner regulations. *See, e. g., United States Postal Service v. Council of Greenburgh Civic Associations*, —— U.S. ——, ——, 101 S.Ct. 2676, 2684-85, 69 L.Ed.2d 517 (1981); *Consolidated Edison Co. v. Public*

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[6]*Flower v. United States*, 407 U.S. 197, 92 S.Ct. 1842, 32 L.Ed.2d 653 (1972); *Schneider v. State*, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155 (1939); *Hague v. CIO*, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423 (1939).

[7]*Tinker v. Des Moines Ind. Comm. School Dist.*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969); *cf. Grayned v. City of Rockford*, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972) (reasonableness of an antinoise ordinance regulation as applied to picketing outside a school).

[8]*Wolin v. Port of N.Y. Auth.*, 392 F.2d 83 (2d Cir.), *cert. denied*, 393 U.S. 940, 89 S.Ct. 290, 21 L.Ed.2d 275 (1968) (bus station); *Chicago Area Military Project v. Chicago*, 508 F.2d 921 (7th Cir.), *cert. denied*, 421 U.S. 992, 95 S.Ct. 1999, 44 L.Ed.2d 483 (1975) (airport).

[9]Both *Albany Welfare Rights Org. v. Wyman*, 493 F.2d 1319 (2d Cir.), *cert. denied*, 419 U.S. 838, 95 S.Ct. 66, 42 L.Ed.2d 64 (1974), and *Unemployed Workers Union v. Hackett*, 332 F.Supp. 1372 (D.R.I. 1971), struck down no solicitation rules which prohibited leafletting in welfare waiting rooms.

[10]*Edwards v. South Carolina*, 372 U.S. 229, 83 S.Ct. 680, 9 L.Ed.2d 697 (1963).

[11]*Adderly v. Fla.*, 385 U.S. 39, 87 S.Ct. 242, 17 L.Ed.2d 149 (1966).

[12]*Greer v. Spock*, 424 U.S. 282, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1975).

[13]*Lehman v. City of Shaker Heights*, 418 U.S. 298, 94 S.Ct. 2714, 41 L.Ed.2d 770 (1974).

[14]*See L. Tribe, American Constitutional Law* § 12-21, at 691 (1978).

Service Commission, 447 U.S. 530, 537-39, 100 S.Ct. 2326, 2333-34, 65 L.Ed.2d 319, 327-29 (1980); *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 93, 97 S.Ct. 1614, 1618, 52 L.Ed.2d 155 (1977); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council* 425 U.S. 748, 771, 96 S.Ct. 1817, 1830, 48 L.Ed.2d 346, 363-64 (1976), *Grayned v. Rockford*, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972); *Cox v. New Hampshire*, 312 U.S. 569, 61 S.Ct. 762, 85 L.Ed. 1049 (1941).

Without addressing the parties' specific contentions regarding the propriety of the District Court's application of the "historical test" or the "realistic test," or both, in determining whether Parkland is a "public forum," we conclude the judgment must be affirmed. There can be little question that a public hospital is, for First Amendment purposes, very different from municipal streets and parks which have traditionally served and previously been characterized as forums for free public assembly and communication of thoughts by private citizens. *See* text above and note 6, *supra*.

The Supreme Court has suggested that while performing public functions public hospitals are akin to jails and may impose reasonable time, place, and manner restrictions on First Amendment activities. *See Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 512 n.6, 89 S.Ct. 733, 739 n.6, 21 L.Ed.2d 731, 741 n.6 (1969). Moreover, in *Lehman v. City of Shaker Heights*, 418 U.S. 298, 94 S.Ct. 2714, 41 L.Ed.2d 770 (1974), the Supreme Court stated the Constitution does not require that display cases in public hospitals become public forums open to every would-be pamphleteer and politician. *Id.* at 304, 94 S.Ct. at 2718, 41 L.Ed.2d at 778. Following these intimations, other courts also have concluded that even peaceful speech and assembly interfering in any way with the functioning of a hospital may be excluded. *See, e. g., United States v. Douglass*, 579 F.2d 545, 549 (9th Cir. 1978); *Chicago Area Military Project v. City of Chicago*, 508 F.2d 921, 925 (7th Cir. 1975); *International Society for Krishna Consciousness v. Schrader*, 461 F.Supp. 714, 718 (N.D.Tex.1978).

Despite the Supreme Court's recent rulings in *NLRB v. Baptist Hospital, Inc.*, 442 U.S. 773, 99 S.Ct. 2598, 61 L.Ed.2d 251 (1979), and *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 98 S.Ct. 2463, 57 L.Ed.2d 370 (1978), permitting limited union solicitation in "non-patient care" areas of hospitals, we find those cases factually distinguishable from that before us. To say the least, Parkland hospital is overcrowded and congested. Over twice as many patients are seen in the outpatient clinic as it was designed to handle on a daily basis. Of the average, 900 patients are treated each day in the outpatient clinic and approximately five percent of these are admitted to the main hospital for inpatient care. Some of those checking in at the outpatient clinic require emergency care. Blood is drawn in areas of the first floor to which the public has direct access. Because of the high traffic flow through the outpatient clinic, employees were requested in 1977 not to use it as a means of ingress to or egress from the main hospital. When ACORN did conduct activities at Parkland, the lobby of the hospital became so congested that traffic to and from the outpatient clinic was blocked.

[1] From our review, we conclude such was not the case in *Baptist Hospital* or *Beth Israel Hospital*. Consequently, we determine that the conditions at Parkland warrant the implementation of time, place, and manner restrictions on First Amendment activity in even the nonpatient care areas of the hospital and outpatient clinic areas which might in a different hospital not interfere with the functions of providing care to the sick and injured. Unlike the District Court, in reaching our conclusion we have not considered the content of the leaflets. *See Council of Greenburgh Civic Associa-* 85, 69 L.Ed.2d at 517; *Consolidated Edison*, 447 U.S. at 537, 100 S.Ct. at 2333, 65 L.Ed.2d at 327. Rather, we emphasize that our decision is based on the necessity to ensure that the extreme congested conditions at Parkland are not further aggravated. We merely wish to enable those who need health care at Parkland to receive it without interference and without the grave possibilities of adverse medical reactions from such disturbing conditions.

[2] Moreover, despite ACORN's arguments, we do not find that it has shown a lack of suitable alternative forums for conducting its solicitations. We agree with the District Court that "just because Parkland Hospital may be the best forum does not mean it is a constitutionally protected forum." The complex is surrounded by public streets and public parking lots. Advertisements may be run in local newspapers and on area television or radio stations. Neighborhoods may be canvassed by pamphleteers. In light of the congested conditions at Parkland, we do not find it unreasonable to expect ACORN to utilize one of these alternative forums.

III.

ACORN also claims that the District Court incorrectly concluded that Parkland's "no solicitation rule," applied nondiscriminately, does not violate the First Amendment. Specifically, ACORN claims that the "rule" must be struck down because it is both "vague" and "overbroad."

Having determined that Parkland may constitutionally limit the activities of ACORN in the front lobby of Parkland and its various outpatient waiting rooms, we need not reach the constitutionality of the "no solicitation rule." Our ruling that Parkland was justified in restricting ACORN's activities in certain sensitive areas of the hospital transcends the "no solicitation rule," thus we need not determine the constitutionality of that rule.[18] The rule, which plainly prohibited solicitation on any part of the hospital's premises without the permission of the Hospital Administrator, need not be tested for constitutional deficiencies under the present facts.

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[18]This Court observes, in passing, that the "no solicitation rule" is quite clear in its prohibition of all solicitation without prior written approval, thus the rule does not apear "vague". As to the overbreath of the rule, we defer to the U.S. Supreme Court's recent holding in *Heffron v. International Society for Krishna Conciousness, Inc.*, ... U.S. ....., 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981), wherein a rule requiring solicitors within Minnesota's fair grounds during the state fair to do so only from a fixed location was found to be constitutional.

Our holding is limited to an approval of Parkland's policy with regard to these plaintiffs, and it would be purely academic for us now to inquire into the application of the "no solicitation rule" to other types of plaintiffs and other areas of the hospital's premises.

In light of our limited holding, that it was necessary neither for the District Court nor for this Court to reach the constitutionality of the "no solicitation rule," we emphasize that Parkland is not forbidden to enact a new "no solicitation rule" that explicitly sets forth the activities to be restricted, standards for those who apply them, and a detailed definition of its terms. Under the present facts in controversy, however, it is unnecessary to remand that issue to the District Court. For the reasons discussed earlier in this opinion, the judgment of the District Court is affirmed.

AFFIRMED.

DALLAS ASSOCIATION OF COMMUNITY ORGANIZATIONS FOR REFORM NOW, Leon Gowans, and Scott Holladay, Plaintiffs,

v.

DALLAS COUNTY HOSPITAL DISTRICT, Defendant.

Civ. A. No. 3-79-0055-H.

United States District Court,
N. D. Texas,
Dallas Division.

Nov. 8, 1979.

Organization of low to moderate income families created to promote social and economic changes brought action challenging, on First Amendment grounds, public hospital's no-solicitation rule. The District Court, Sanders, J., held that: (1) a public hospital is not a public forum for First Amendment purposes, and (2) hospital's no-solicitation rule, applied nondiscriminately, did not violate any First Amendment rights of plaintiffs, seeking to distribute leaflets calling attention to allegedly defective health care conditions.

Judgment for defendant.

1. Constitutional Law — 90.1(4)

Public hospital, as principal place of health care for indigents, was not a public forum for First Amendment purposes and, hence, hospital's no-solicitation rule, applied nondiscriminately, did not violate First Amendment rights of community organization and others seeking to distribute in common areas pamphlets identifying alleged deficiencies in health care condition including need for neighborhood clinics and improved waiting room conditions and reduced waiting time. U.S.C.A.Const. Amend. 1; Vernon's Ann.Tex.Civ.St. art. 4494n.

2. Constitutional Law — 90.1(4)

As a prior restraint on speech, public hospital's no-solicitation rule carried a heavy presumption against its validity. U.S.C.A.Const. Amend. 1.

3. Constitutional Law — 90.1(1)

Prior restraints against leafleting are particularly suspect because of the importance of pamphleteering in the birth of liberty in this country. U.S.C.A.Const. Amend. 1.

4. Constitutional Law — 90(3)

Merely stating that prior restraints on speech are presumptively invalid does not establish the analytical framework for a First Amendment case. U.S.C.A.Const. Amend. 1.

5. Constitutional Law — 90(3)

The three-step approach for analyzing freedom of speech cases involves first, a determination whether the activity is the type of speech protected by the First Amendment and, second, if the activity is protected speech, the court must next decide whether the proposed forum is a public forum, i. e., where there is an appropriate forum for the speech and, third, if the court concludes that the area is a public forum, it must balance First Amendment rights against the interests of the state in regulating the speech. U.S.C.A.Const. Amend. 1.

6. Constitutional Law — 82(3)

First Amendment guarantees are not absolute. U.S.C.A. Const. Amend. 1.

7. Constitutional Law — 90(3)

A person does not have a constitutional right to speak whenever and however and wherever he or she pelases. U.S.C.A.Const. Amend. 1.

8. Constitutional Law — 90(3)

First Amendment activity can constitutionally be subjected to reasonable time, manner, and place regulations, and in some cases prohibited. U.S.C.A.Const. Amend. 1.

9. Constitutional Law — 90(3)

Discretionary rules resulting in discrimination on basis of content may more likely violate the First Amendment than a total ban. U.S.C.A.Const. Amend. 1.

10. Constitutional Law — 90.1(4)

Activities of organization of low to moderate income families designed to promote social and economic changes in leafleting at public hospital for purpose of improving allegedly deficient health care conditions and identifying such conditions as need for neighborhood clinics, improved waiting room condtions, reduced waiting time, use of Spanish-speaking employees in outpatient clinics and additional parking for patients and their families was the kind of activity protected by the First Amendment. U.S.C.A.Const. Amend. 1.

11. Constitutional Law — 90.1(4)

Public ownership or public admittance is a threshold requirement for a "public forum" for First Amendment purposes. U.S.C.A.Const. Amend. 1.

12. Constitutional Law — 90.1(4)

A place is not a public forum for First Amendment purposes simply because it is publicly owned or because the public is permitted to be there. U.S.C.A. Const. Amend. 1.

13. Constitutional Law — 90.1(4)

Underlying the public forum concept is a rationale that there are some places in community which are inherently inappropriate for certain kinds of First Amendment activity. U.S.C.A.Const. Amend. 1.

14. Constitutional Law — 90.1(4)

In deciding the public forum question for First Amendment purposes two tests are used: historical and realistic, with the historical test looking back in time to discern if the forum in question has historically been a place for public speech, while the realistic test requires determining the character and primary normal activity of the forum. U.S.C.A.Const. Amend. 1.

15. Constitutional Law — 90.1(4)

The historical test should not be the exclusive measure of what is a public forum for First Amendment purposes as it places a time lock on the Constitution. U.S.C.A.Const. Amend. 1.

16. Constitutional Law — 90.1(4)

Under the realistic test for determining whether a place is a public forum for First Amendment purposes, if the First Amendment activity is not fundamentally incompatible with the character and primary normal activity of the forum, the place is a public forum. U.S.C.A.Const. Amend. 1.

17. Constitutional Law — 90.1(4)

The following places are public forums for certain First Amendment activities: streets, sidewalks, parks, schools, public transportation facilities, welfare office waiting rooms, and state capitol grounds. U.S.C.A.Const. Amend. 1.

18. Constitutional Law — 90.1(4)

The following places are not public forums for First Amendment purposes: jails, military bases and city buses. U.S.C.A.Const. Amend. 1.

19. Constitutional Law — 90.1(4)

A public hospital is not a public forum for First Amendment purposes. U.S.C.A. Const. Amend. 1.

20. Hospitals — 6

Public hospital's no-solicitation rule would not be stricken as overly broad, with district court fashioning a rule permitting distribution in public areas, such as clinic waiting rooms, of pamphlet calling attention to and seeking rectification of alleged deficiencies in outpatient services. U.S.C. A.Const. Amend. 1.

Roger E. Albright, Dallas Legal Services Foundation, Inc., Dallas, Tex., for plaintiffs.

Earl Luna and Thomas V. Murto, III, Dallas, Tex., for defendant.

OPINION

SANDERS, District Judge.

In this first amendment freedom of speech case plaintiffs challenge the constitutionality of defendant's no solicitation rule at Parkland Memorial Hospital in Dallas. The rule prevents plaintiffs from distributing leaflets at Parkland which are critical of the hospital.

Plaintiffs contend this no solicitation rule is an overly broad prior restraint of speech, and sue to have the rule declared unconstitutional and its enforcement enjoined.

Defendant asserts Parkland Hospital is not a public forum and the no solicitation rule is necessary to enable the hospital in carrying out its purpose and primary activity of rendering health care to patients.

[1] The court holds Parkland Hospital is not a public forum for first amendment activity, and plaintiffs do not have a constitutional right to solicit or to distribute leaflets at Parkland.[1]

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[1]The Board of Managers of the Defendant holds its monthly meetings at Parkland. The meetings are open to the public and members of the public, including plaintiffs, currently appear and speak. Nothing in this Opinion is to be construed as affecting the open meeting policy of the Board.

I. The Parties

A. *The Hospital*

Parkland Memorial Hospital ("Parkland") in Dallas, Texas, is owned and operated by Defendant Dallas County Hospital District ("the District").[2] Parkland has facilities for emergency care, inpatient hospital care, and outpatient care.

The Outpatient Clinic ("clinic") is the principal area of the hospital in which Plaintiffs want to distribute their leaflets. This clinic is a five story annex to the main part of the hospital. The clinic provides medical care to indigent patients who are ambulatory, which usually means they are well enough to walk in, receive care, and walk out. The clinic now treats many more patients than it was designed to handle;[3] it is always extremely crowded. There is a large waiting room on each floor of the clinic with closed treatment rooms surrounding the waiting rooms. Most of the patients served in the clinic are indigent in contrast to the inpatient hospital areas where there are a substantial number of paying patients.[4] The clinic has two entrances, one from the main lobby and one from the outside.[5]

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[2]The District was created under art. 4494n, Tex.Rev.Civ.Stat. (Vernon 1976) Approximately one-half of the District's operating revenues are from *ad valorem* taxes levied in Dallas County. The Board of Managers, which is appointed by the Dallas County Commissioners Court, governs the hospital. The Board appoints a general manager, known as the Administrator of the Hospital District.

[3]In 1978 the clinic averaged 906 patients a day in a facility designed for 400. Since the clinic was built in 1958, the number of patients treated there has increased on an average of 10% per year. A 1978 study projected future demand for the clinic and recommended a new ten story building to replace the current five story structure.

[4]Less than 10% of the outpatients are paying patients. A little over half of the inpatients are paying patients.

[5]In 1977 the outside entrance to the clinic was so crowded the assistant administrator instructed the employees to quit using that entrance.

Plaintiffs seek to distribute leaflets in the clinic waiting areas, the first floor halls and lobby, the hospital streets and sidewalks, the hospital parking lots, the cafeteria, the gift shop, and the vending machine section. The heart of the first floor is the small main lobby with halls like arteries branching from the lobby.[6] These halls on the first floor lead to the Outpatient Clinic; to the Triage Clinic, which diagnoses patients and directs them to the appropriate areas of the hospital; to the pharmacy, which has a large and crowded waiting room; and to the administrative offices of the hospital.

Health care personnel sometimes use the waiting rooms for activities related to patient care. These activities include teaching patients, counselling families, taking patient histories, and administering medication and I.V.'s. On rare occasions when the treatment rooms are full some medical treatment like drawing blood occurs in the clinic waiting rooms. More commonly, the clinic waiting rooms because of their size are used for teaching patients. For example, instruction to diabetic patients is given in the clinic waiting rooms weekly. There are also classes in the clinic waiting rooms for obstetrics and cardiac patients.

The hospital complex is surrounded by busy public streets. The vehicular access to the hospital is limited to three entrances. (A fourth entrance is to the emergency room.) There is a patient parking lot on the grounds of the hospital, and a public parking lot across the street. Those patients who do not arrive by cars or taxis generally come by bus. There are three bus stops located on city property adjacent to the hospital.

B. *ACORN*

Plaintiffs are Dallas Association of Community Organizations for Reform Now ("ACORN"); Scott Holladay, the past regional organizer for ACORN; and Leon Gowans, chairman

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[6]The main lobby has a registration desk. Frequently, ill patients who should go to the emergency room come to the registration desk.

of a neighborhood group affiliated with ACORN. ACORN is an organization of low to moderate income families which operates through neighborhood groups to promote social and economic changes. In the fall of 1978 one of the issues in which ACORN members were interested was the improvement of health care provided to low and moderate income residents of Dallas County. During this time ACORN members were attending meetings of the Board of Managers of the District and speaking to the press about their grievances. Plaintiffs make no complaint regarding their access to the Board meetings.

Parkland is the primary hospital in Dallas County providing medical care to the indigent. ACORN believes that the quality of the medical care rendered at Parkland Hospital is good. ACORN, however, desires to mobilize the patrons of Parkland to improve defective health care conditions. ACORN, therefore, prepared two leaflets identifying these defective conditions as (1) the need for neighborhood clinics, which ACORN believed the Board of Managers of the District opposed; (2) improved waiting room conditions; (3) reduced waiting time at Parkland; (4) Spanish-speaking employees in the clinic; and (5) additional parking for patients and their families.[7]

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[7]One of the leaflets, which was less controversial than the other, was two typed pages. This leaflet promoted neighborhood health clinics, criticized the Board's opposition to these clinics, and listed some of the other concerns of ACORN about Parkland. Most of the testimony related to the possible detrimental effects on patients of the second leaflet. At the top of this one page leaflet is a large bold faced caption saying, "How long have you been waiting for decent health care?" Under the caption is a cartoon depicting the patient waiting area. The doctor at the door is shouting, "Next!" to the only occupant of the waiting room — a skeleton draped in a chair with cobwebs over its head. Under this graphic cartoon is a short demand for neighborhood health clinics, a notice of an ACORN meeting at Parkland, and a list of some other health care issues.

II. The Prior Restraint

A. *The No Solicitation Rule*

In 1967 the Board of Managers of the Defendant District adopted the no solicitation rule which is challenged in this lawsuit. The rule states:

> "For the protection of our employees and patients, solicitation of any kind on hospital premises is prohibited without prior written approval of the Hospital Administrator."

The purpose of the no solicitation rule is to shield patients, their families, and employees from potentially disruptive influences unrelated to the health care function of the hospital. Other hospitals have similar no solicitation rules.

The Board interprets the no solicitation rule to prohibit distribution of written material on hospital property both inside and outside the buildings. The rule, of course, does not ban solicitation on public property around the hospital, such as the city streets, sidewalks, and public parking lots.

The current Administrator testified that he does not refuse permission to distribute written material because he disagrees with its content. Since the adoption of the no solicitation rule no Administrator has ever approved the distribution of leaflets or pamphlets by an outside group.

The hospital staff believes that distribution of literature not related to health care would be disruptive and incompatible with the hospital's health care function.

B. *ACORN Activity at Parkland Hospital*

ACORN members twice went to Parkland Hospital in September, 1978. Both times the Administrator asked them to leave and they did leave peacefully. ACORN did not seek the prior approval of the Administrator on either occasion. The first time about forty-five ACORN members convened in the main lobby on the first floor to read a statement criticizing conditions at Parkland. This event was covered

by two local television stations and the press. A crowd gathered in the lobby which obstructed the flow of traffic across the lobby to the clinics on the first floor. About ten days later six to eight ACORN members entered the first floor of the Outpatient Clinic and attempted to distribute their leaflets to people in the waiting room.

ACORN concedes leafleting in patient rooms or other areas of immediate patient care would be inappropriate but asserts the more public area of the hospital, e. g., waiting rooms, should be open for distribution of leaflets.

III. *Public Hospital: Public Forum?*

[2-5] As a prior restraint on speech the hospital's no solicitation rule carries a heavy presumption against its validity. *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419, 91 S.Ct. 1575, 29 L.Ed.2d 1 (1971). Prior restraints against leafleting are particularly suspect because of the importance of pamphleteering in the birth of liberty in this country. *Lovell v. Griffin*, 303 U.S. 444, 451, 58 S.Ct. 666, 82 L.Ed. 949 (1938). However, simply stating that prior restraints on speech are presumptively invalid does not establish the analytical framework for a first amendment case. Recent Supreme Court cases suggest a three step approach for analyzing freedom of speech cases. *Greer v. Spock*, 424 U.S. 828, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1976); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 94 S.Ct. 2714, 41 L.Ed.2d 770 (1974); *Grayned v. City of Rockford*, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972); *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969). The court must first determine if the activity is the type of speech protected by the first amendment. If the activity is protected speech, the court must next decide whether the proposed forum is a public forum; that is, whether it is an appropriate forum for the speech. If the court concludes that the proposed forum is not a public forum, the analysis stops there. If the court concludes that the area is a public forum, it must then bal-

ance first amendment rights against the interests of the state in regulating the speech.

[6-9] This analytical framework is overlaid with several well established principles of first amendment law. The previously mentioned presumption against prior restraints is one of these principles. Another tenet is that first amendment guarantees are not absolute; a person does not have a constitutional right to speak whenever and however and wherever he or she pleases. *Adderly v. Florida*, 385 U.S. 39, 48, 87 S.Ct. 242, 17 L.Ed.2d 149 (1966); *Greer v. Spock*, 424 U.S. at 836, 96 S.Ct. 1211 (1976). The corollary of this principle is that first amendment activity can constitutionally be subjected to reasonable time, manner, and place regulations, and in some cases prohibited. *Hudgens v. NLRB*, 424 U.S. 507, 520, 96 S.Ct. 1029, 47 L.Ed.2d 196 (1976); *Grayned v. City of Rockford*, 408 U.S. at 115, 92 S.Ct. 2294 (1972). Still another principle is that discretionary rules resulting in discrimination on the basis of content may more likely violate the first amendment than a total ban. *Cf. Police Department v. Mosley*, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972) (violation of equal protection to distinguish between labor picketing and other peaceful picketing); *but see Lehman v. City of Shaker Heights*, 418 U.S. 298, 94 S.Ct. 2714, 41 L.Ed.2d 770 (1974) (not unconstitutional to allow commercial advertising and yet ban political advertising on city buses).

[10] Applying the three step analysis to this case, the Court concludes that ACORN's leafleting at Parkland Hospital is the kind of activity protected by the first amendment. *See Organization for a Better Austin v. Keefe*, 402 U.S. 415, 91 S.Ct. 1575, 29 L.Ed.2d 1 (1971). If this activity took place in a traditional public forum, there would be no question of its propriety.

We therefore turn next to whether the proposed forum — Parkland Hospital — is a public forum. On that issue, which is decisive, this case is one of first impression.

[11-13] Before examining the holdings of the U.S. Supreme Court and other federal courts regarding public forums, we mention some principles useful in analyzing the public forum concept. The concept is a relatively recent adjunct to first amendment freedom of speech law.[8] It is difficult to state precisely what proof is relevant to proving that a particular place is a public forum. Public ownership or public admittance is a threshold requirement for a public forum, but a place is not a public forum simply because it is publicly owned or because the public is permitted to be there. *Greer v. Spock*, 424 U.S. at 836, 96 S.Ct. 1211 (1976); *Adderly v. Florida*, 385 U.S. at 47, 87 S.Ct. 242 (1966). Underlying the public forum concept is a rationale that there are some places in a community which are inherently inappropriate for certain kinds of first amendment activity.

[14-16] In deciding the public forum question two tests have been used — historical and realistic. The historical test looks back in time to discern if the forum in question has historically been a place for public speech. *See Greer v. Spock*, 424 U.S. 828, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1976); *Hague v. CIO*, 307 U.S. 496, 515, 59 S.Ct. 954, 83 L.Ed. 1423 (1939). The historical test should not be the exclusive measure of what is a public forum; it places a time lock on the Constitution. The realistic test examines the present activity in the forum and can suitably be used in conjunction with the historical test. *See Lehman v. City of Shaker Heights*, 418 U.S. at 302-04, 94 S.Ct. 2714 (1974); *Grayned v. City of Rockford*, 408 U.S. at 115-19, 92 S.Ct. 2294 (1972). The realistic test requires determining the character and

[8] A discussion of the public forum concept first appears in the dissenting opinion of *Adderly v. Florida*, 385 U.S. 39, 53-55, 87 S.Ct. 292, 17 L.Ed.2d 149 (1966), written by Justice Douglas. The earliest academic statement on the public forum analysis, is Kalven, "The Concept of the Public Forum", 1965 Sup.Ct.Rev. 1. See Note, "The Public Forum: Minimum Access, Equal Access, andthe First Amendment", 72 Yale L.J. 877 (1975), for an update on the public forum analysis through *Lehman;* and Horning, "The First Amendment Right to a Public Forum," 1969 Duke L.J. 931.

primary normal activity of the forum. If first amendment activity is not fundamentally incompatible with that character and activity, then the place is a public forum. Justice Powell concurring in *Greer v. Spock*, 424 U.S. at 843, 96 S.Ct. at 1220 (1976), stated the realistic test this way:

> The Court is to inquire "whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." ... [I]t is not sufficient that the area in which the right of expression is sought to be exercised be dedicated to some purpose other than use as a "public forum," or even that the primary business to be carried on in the area may be disturbed by the unpopular viewpoint expressed. Our inquiry must be more carefully addressed to the intrusion on the specific activity involved and to the degree of infringement on the first amendment rights of the private parties. *Some basic incompatibility must be discerned between the communication and the primary activity of an area.* (Emphasis added).

[17, 18] The alignment of the public forum cases illustrates the application of these two tests to particular forums. The courts have concluded that the following places are public forums for certain first amendment activities: streets; sidewalks and parks[9]; schools[10]; public transportation facili-

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[9]*Flower v. United States*, 407 U.S. 197, 92 S.Ct. 1842, 32 L.Ed.2d 653 (1972); *Schneider v. State*, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155 (1939); *Hague v. CIO*, 307 U.S. 976, 59 S.Ct. 954, 83 L.Ed. 1423 (1939).

[10]*Tinker v. Des Moines Ind. Comm. School Dist.*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969); *cf. Grayned v. City of Rockford*, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972) (reasonableness of an antinoise ordinance regulation as applied to picketing outside a school).

ties[11]; welfare office waiting rooms[12]; state capitol grounds[13]. The courts have held that the following are not public forums: jails[14]; military bases[15]; city buses[16].

[19] In the light of these cases this Court concludes that a public hospital is not a public forum. There is no evidence in the record, and the Court can conceive of none, to show that a hospital has historically been a forum for any kind of portected speech. In fact, it is part of our history to regard the hospital as a haven sheltered from outside noises and activities.

The realistic test likewise supports this conclusion. The purpose and primary activity of Parkland is rendering quality health care. Quality health care requires there be no impediment to the speed with which it is given and no disturbing between leafleting in the public areas of a hospital and the influences on the patients. There is a "basic incompatibility" rendition of health care. This incompatibility arises both from the type of first amendment activity — physical distri-

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[11]*Wolin v. Port of N.Y. Auth.*, 392 F.2d 83 (2d Cir.) *cert denied* 393 U.S. 940, 89 S.Ct. 290, 21 L.Ed.2d 275 (1968) (bus station); *Chicago Area Military Project v. Chicago*, 508 F.2d 921 (7th Cir.), *cert. denied*, 421 U.S. 992, 95 S.Ct. 1999, 44 L.Ed.2d 483 (1975) (airport).

[12]Both *Albany Welfare Rights Org. v. Wyman*, 498 F.2d 1319 (2d Cir.) *cert. denied*, 419 U.S. 838, 95 S.Ct. 66, 42 L.Ed.2d 64 (1974), and *Unemployed Workers Union v. Hackett*, 332 F.Supp. 1372 (D. R.I.1971), struck down no solicitation rules which prohibited leafleting in welfare faiting rooms.

[13]*Edwards v. S. C.*; 372 U.S. 229, 93 S.Ct. 680, 9 L.Ed.2d 697 (1963).

[14]*Adderly v. Fla.*, 385 U.S. 39, 87 S.Ct. 242, 17 L.Ed.2d 149 (1966).

[15]*Greer v. Spock*, 424 U.S. 828, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1976).

[16]*Lehman v. City of Shaker Heights*, 418 U.S. 298, 94 S.Ct. 2714, 41 L.Ed.2d 770 (1974).

bution of leaflets — and the possible detrimental effect on patients from the content of the leaflets. Distribution of leaflets in the already overcrowded waiting rooms and halls of Parkland could interfere with health care. Accosting ill patients to hand them a leaflet — whether in the parking lot, lobbies, clinic waiting rooms or other hospital areas — could be detrimental to their health. Every day some outpatients are so ill that they must be admitted to the hospital.[17]. The treatment and teaching sessions that occur in the waiting rooms might easily be disrupted by people distributing leaflets. Medical experts also felt that literature critical of the hospital could induce the patient to leave and not receive treatment. The patient who left Parkland might not receive care anywhere else because Parkland is the principal place for indigent health care in Dallas County.

In addition to the dangers to a patient's physical health, the medical experts expressed concern for the patients' mental and emotional health. The testimony showed that sick persons frequently react adversely and unpredictably to unexpected stimuli. Sick persons are anxious and need to be protected from possibly harmful distractions. The content of written material may be particularly disturbing to an ill patient if critical of the patient's medical care. ACORN can make the distinction between criticism of medical care and the conditions under which that care is rendered but this distinction may be less clear to a sick and indigent patient.

Dicta from several decisions support the conclusion that a public hospital is not a public forum for first amendment activity. The Supreme Court in *Lehman v. City of Shaker Heights*, 418 U.S. at 304, 94 S.Ct. 2714, so implied, as have several lower courts. *United States v. Douglass*, 579 F.2d 545, 549 (9th Cir. 1978); *Chicago Area Military Project v. City of Chicago*, 508 F.2d 921, 925 (7th Cir.), *cert. denied* 421 U.S. 992, 95 S.Ct. 1999, 44 L.Ed.2d 483 (1975); *ISKON v. Schrader*, 461 F.Supp. 714, 718 (N.D. Tex.1978).

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[17]About 4.7% of the patients admitted each month to the hospital come from outpatient Clinic.

Two recent Supreme Court decisions in the analogous area of union solicitation are particularly instructive regarding the protected status of hospitals. *NLRB v. Baptist Hospital*, — U.S. —, 99 S.Ct. 2598, 61 L.Ed.2d 251 (1979); *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 98 S.Ct. 2463, 57 L.Ed.2d 370 (1978). These two cases examined the NLRB presumption against the validity of hospital rules limiting union solicitation of hospital employees. Both cases emphasize hospitals should be treated differently from other forums for union solicitation because of the overriding concerns for health care and the welfare of the patients. *See NLRB v. Baptist Hospital*, 99 S.Ct. at 2606-2607, & n.16, 61 L.Ed.2d at 261-263, & n.16, and Chief Justice Burger's concurring opinion; *Beth Israel Hospital v. NLRB*, 437 U.S. at 498-99, 505, 508, 98 S.Ct. 2463, and the separate concurring opinions of Justice Blackmun and Justice Powell. A passage from *Beth Israel* eloquently expresses the rationale for this Court's conclusion that leafleting is incompatible with the purpose and primary normal activity of a hospital:

> Hospitals, after all, are not factories or mines or assembly plants. They are hospitals, where human ailments are treated, where patients and relatives alike often are under emotional strain and worry, where pleasing and comforting patients are principal facets of the day's activity, and where patient and his family — irrespective of whether that patient and that family are labor or management oriented — need a restful, uncluttered, relaxing and helpful atmosphere, rather than one reminding of the tensions of the marketplace in addition to the tensions of the sick bed.

437 U.S. at 509, 98 S.Ct. at 2478 (Blackmun, J., concurring). Since the Supreme Court clearly calls for protection of patients who would be merely bystanders to union solicitation, it follows that even more protection of patients is required when — as in this case — they are the targets of the solicitation.

[20] Plaintiffs recognize some incompatibility between their leafleting and the primary activity of certain places in the hospital. They realize it would be inappropriate to leaflet in some areas, e. g., hospital rooms and treatment areas, but insist it would be appropriate to leaflet in more public areas, such as clinic waiting rooms. Plaintiffs propose, in effect, that this Court strike the no solicitation rule as overly broad and fashion a solicitation rule with the first amendment in one hand and a floor plan of the hospital in the other. This the Court declines to do.

The Court is of the opinion the hospital must be considered in its entirety as an institution whose purpose and primary normal activity is health care. Patients in varying degrees of health, their families, and health care professionals flow through all parts of the hospital. This court cannot make the requisite medical judgment as to which patients are well enough to be unaffected by the proposed solicitation. *Cf. Parham v. J.L.*, ——U.S.——, 99 S.Ct. 2493, 2506-08, 61 L.Ed.2d 101, 122-25 (1979) (psychiatrists better qualified than judges to decide if child is mentally or emotionally ill). Nor is it possible to determine solicitation in a given area of the hospital would never affect a patient or the rendering of health care in another area.

Plaintiffs argue the public areas of the hospital are an appropriate public forum because there is no alternatives forum in which to reach the relevant audience. This argument derives from a Second Circuit case, *Albany Welfare Rights Organization v. Wyman*, 493 F.2d 1319, *cert. denied*, 419 U.S. 838, 95 S.Ct. 66, 42 L.Ed.2d 64 1974). Plaintiffs contend they are promoting better health care for indigents and their most relevant audience is found in the environs of the primary facility for indigent health care, Parkland Hospital. However, the similarity between *Wyman* and this case is not compelling. Patients in the hospital are more similar to the "captive audience" protected by the Supreme Court in *Lehman v. Shaker Heights*, 418 U.S. at 302, 307-08, 94 S.Ct. 2714 (Douglas, J., concurring). In *Lehman* the plurality

of the Court reasoned that bus riders were a captive audience and were entitled to protection from the intrusion on their privacy resulting from political advertising. Parkland patients waiting for medical care are clearly even more captive than the bus riders because the patients can only escape the intrusion by leaving and thus possibly injuring their health.

In any event, just because Parkland Hospital may be the best forum does not mean it is a constitutionally protected forum. Indeed, the presence of alternative forums undercuts Plaintiffs' argument. The vast majority of the hospital's patients live in identifiable sections of the county, primarily in urban areas in the City of Dallas. Over one-third of the outpatients live in three zip code zones of Dallas. ACORN could leaflet in those areas. Additionally, there are the obvious alternatives of statements to the media and speaking at the open meeting of the Board of Managers of the District.[18] Of course, this decision does not purport to deny Plaintiffs access to the public streets, public parking lots, or bus stops in the vicinity of Parkland complex. *See ISKON v. Schrader*, 461 F.Supp. at 718 (N.D.Tex.1978).

Parkland is not a public forum for first amendment activity. Parkland's no solicitation rule, applied nondiscriminately, does not violate the first amendment and is constitutional.

Judgment will be entered for defendant.

D-1

U.S. Court of Appeals
FILED
June 18, 1982
Gilbert F. Ganucheau, Clerk

In The
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*
UNIT A

No. 79-3967

DALLAS ASSOCIATION OF COMMUNITY ORGANIZTATIONS FOR REFORM NOW, ET AL.,
Plaintiffs-Appellants,

v.

DALLAS COUNTY HOSPITAL DISTRICT,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Texas

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ON SUGGESTION FOR REHEARING EN BANC
(Opinion 3-19-82, 5 Cir., 198 ...., ... F.2d .....).
(June 18, 1982)

Before COLEMAN, BROWN and GEE, Circuit Judges.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge of this Administrative Unit in regular active service having requested that the Court be polled on rehearing

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*Former Fifth Circuit case, Section 9(1) of Public Law 96-452-October 14, 1980.

en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is DENIED.

(XXX) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Administrative Unit having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

Clerk's Note:
See Rule 41 FRAP and Local Rule 17 for Stay of the Mandate.

E-1

U.S. Court of Appeals
FILED
August 9, 1982
Gilbert F. Ganucheau, Clerk

In The
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 79-3967

DALLAS ASSOCIATION OF COMMUNITY ORGANIZATIONS FOR REFORM NOW, ET AL.,
Plaintiffs-Appellants,

v.

DALLAS COUNTY HOSPITAL DISTRICT,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas

ORDER:

☐ The motion of Appellee for ☐ stay ☒ recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

☒ The motion of Appellee for ☐ stay ☒ recall and stay of the issuance of the mandatae pending petition for writ of certiorari is GRANTED to and including Sept. 15, 1982, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue

the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned cretificate shall be filed with the Clerk of this Court within that time.

☐ The motion of ..... for a further stay of the issuance of the mandate is GRANTED to and including ....., under the same conditions as set forth in the preceding paragraph.

☐ The motion of ..... for a further stay of the issuance of the mandate is DENIED.

/s/ JOHN R. BROWN

United States Circuit Judge

FIRST AMENDMENT

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Art. 4494n. County hospital districts; counties of 190,000 or more and Galveston County

Creation of district

Section 1. Any county having a population of 190,000 or more, and Galveston County, that does not own or operate, or that does own and operate a hospital or hospital system, by itself or jointly with a city, for indigent and needy persons, may be constituted a Hospital District as hereinafter set out, and may take over the hospital or hospital system, either owned separately by a county or jointly with a city, or may provide for the establishment of a hospital or hospital system to furnish medical aid and hospital care to the indigent and needy persons residing in said Hospital District; provided, however, that such Hospital District shall not be created unless and until an election is duly held in said county for such purpose, which said election may be initiated by the Commissioners Court upon its own motion or upon a petition of one hundred (100) resident qualified property taxpaying voters, to be held not less than thirty (30) days from the time said election is ordered by the Commissioners Court. At said election there shall be submitted to the qualified property taxpaying voters the proposition of whether or not a Hospital District shall be created in the county; and a majority of the qualified property taxpaying voters participating in said election voting in favor of the proposition shall be necessary. The ballots shall have printed thereon:

"FOR the creation of a Hospital District; providing for the levy of a tax not to exceed Seventy-five Cents (75¢), on the One Hundred Dollars ($100.00) valuation"; and

"AGAINST the creation of a Hospital District; providing for the levy of a tax not to exceed Seventy-five Cents (75¢) on the One Hundred Dollars ($100.00) valuation."

If such county or city, either or both of them, has any outstanding bonds theretofore issued for hospital purposes (which by the provisions of Section 4 of this Act are required

to be assumed by the Hospital District), then the ballots for such election shall, instead of the foregoing, have printed thereon:

"FOR the creation of a Hospital District; providing for the levy of a tax not to exceed Seventy-five Cents (75¢) on the One Hundred Dollars ($100.00) valuation; and providing for the assumption by such District of all outstanding bonds heretofore issued by ..... County, and by any city in said county for hospital purposes"; and

"AGAINST the creation of a Hospital District; providing for the levy of a tax not to exceed Seventy-five Cents (75¢) on the One Hundred Dollars ($100.00) valuation; and providing for the assumption by such District of all outstanding bonds heretofore issued by ..... County, and by any city in said county for hospital purposes."

Taxes of district; deposit of taxes and other income

Sec. 2. The Commissioners Court of any county which has voted to create a Hospital District shall have the power and the authority, and it shall be its duty, to levy on all property subject to hospital district taxation for the benefit of the District, a tax of not to exceed Seventy-five Cents (75¢) on the One Hundred Dollars ($100.00) valuation of all taxable property within the Hospital District, for the purpose of (1) paying the interest on and creating a sinking fund for bonds which may have been assumed or which may be issued by the Hospital District for hospital purposes, as herein provided; (2) providing for the operation and maintenance of the hospital or hospital system; and (3) when requested by the Board of Hospital Managers and approved by the Commissioners Court, for the purpose of making further improvements and additions to the hospital system, and for the acquisition of necessary sites therefor, by purchase, lease or condemnation.

The tax so levied shall be collected on all property subject to Hospital District taxation by the Assessor and Collector of Taxes for the county. All income of the Hospital District

shall be deposited in the district depository. Warrants against Hospital District funds shall not require the signature of the County Clerk.

The Commissioners Court shall have the authority to levy the tax aforesaid for the entire year in which the said Hospital District is established, for the purpose of securing funds to initiate the operation of the Hospital District, and to pay assumed bonds.

Sec. 2 amended by Acts 1979, 66th Leg., p. 2327, ch. 841, § 4(s), eff. Jan. 1, 1982.

Secs. 2a, 2b. Repealed by Acts 1979, 66th Leg., p. 2329, ch. 841, § 6(a) (1), eff. Jan. 1, 1982.

El Paso county hospital district; assessment of taxes; rate

Sec. 2c. The Commissioners Court of El Paso County on its own motion may order the Assessor and Collector of Taxes to assess the property in the El Paso County Hospital District at a greater or lesser percentage of its fair cash market value than that used in assessing the property for state and county purposes.

Sec. 2c added by Acts 1979, 66th Leg., p. 671, ch. 298, § 1, eff. Aug. 27, 1979.

Bonds of district; taxes to pay bonds and interest; sinking fund

Sec. 3. The Commissioners Court shall have the power and authority to issue and sell as the obligations of such Hospital District, and in the name and upon the faith and credit of such Hospital District, bonds for the acquisition, purchase, construction, equipment and enlargement of the hospital or hospital system, and for any or all of such purposes; provided, that a sufficient tax shall be levied to create an interest and sinking fund to pay the interest and principal as same matures provided said tax together with any other taxes levied for said District shall not exceed Seventy-five Cents (75¢) in any one year. Such bonds shall be executed in the

name of the Hospital District and on its behalf by the County Judge of the county within which the Hospital District is created, and countersigned by the County Clerk, and shall be subject to the same requirements in the matter of approval thereof by the Attorney General of the State of Texas and the registration thereof by the Comptroller of Public Accounts of the State of Texas as are by law provided for such approval and registration of bonds of such county; and the approval of such bonds by the Attorney General shall have the same force and effect as is by law given to his approval of bonds of such county. No bonds shall be issued by such hospital district (except refunding bonds) until authorized by a majority vote of the legally qualified property taxpaying voters, residing in such Hospital District, voting at an election called and held in accordance with the provisions of Chapter 1 of Title 22 of the Revised Civil Statutes of the State of Texas (1925), as amended, relating to county bonds. Such election may be called by the Commissioners Court of its own motion, or shall be called by it after request therefor by the Board of Hospital Managers; and the same persons shall be responsible for the conduct of such election and the arrangement of all details thereof as the persons charged therewith in connection with other county-wide elections. The cost of any such election shall be a charge upon the Hospital District and its funds; and the Hospital District shall make provision for the payment thereof before the Commissioners Court shall be required to order such an election.

In the manner hereinabove provided, the bonds of such Hospital District may, without the necessity of any election therefor, be issued for the purpose of refunding and paying off any bonded indebtedness theretofore assumed by such Hospital District and any bonds theretofore issued by such Hospital District; such refunding bonds may be sold and the proceeds thereof applied to the payment of any such outstanding bonds or may be exchanged in whole or in part for not less than a like amount of said outstanding bonds and interest matured thereon, but unpaid; provided the average interest cost per annum on the refunding bonds,

computed in accordance with recognized standard bond interest cost tables, shall not exceed the average interest cost per annum so computed upon the bonds to be discharged out of the proceeds of the refunding bonds, unless the total interest cost on the refunding bonds, computed to their respective maturity dates, is less than the total interest cost so computed on the bonds to be discharged out of such proceeds. In the foregoing computations, any premium or premiums required to be paid upon the bonds to be refunded as a condition to payment in advance of their stated maturity dates shall be taken into account as an addition to the net interest cost to the Hospital District of the refunding bonds.

If the city and the county, or either of them, has voted bonds to provide hospital facilities, but such bonds have not been sold at the date of the creation of the Hospital District, the authority for such bonds shall be canceled, and they shall not be sold.

County or city property or funds; transfer to district

Sec. 4. Any lands, buildings or equipment that may be jointly or separately owned by such county and city, and by which medical services or hospital care, including geriatric care, are furnished to the indigent or needy persons of the city and county, shall become the property of the Hospital District; and title thereto shall vest in the Hospital District; provided, however, that whenever any of such property is deemed by the Board of Managers of the Hospital District to be of no further use, presently or in the future, for the purposes for which it was transferred to the Hospital District, the Board of Managers of the Hospital District may, by deed transfer such property, upon any terms deemed suitable by the Board of Managers and the Commissioners Court, back to the city or county from which such property was transferred to the Hospital District upon creation of the Hospital District; and any funds of the city and county, or either, which are the proceeds of any bonds assumed by the Hospital District, as hereby provided, shall become the funds of the

Hospital District; and title thereto shall vest in the Hospital District; and there shall vest in the Hospital District and become the funds of the Hospital District the unspent portions of any funds theretofore set up or appropriated by budget or otherwise by the city or the county, or either of them, for the support and maintenance of the hospital facilities for the year within which the Hospital District comes into existence, thereby providing such Hospital District with funds with which to maintain and operate such facilities for the remainder of such year. All obligations under contract legally incurred by the city or county, or either of them, for the building of, or the support and maintenance of, hospital facilities, prior to the creation of the said District but outstanding at the time of the creation of the District, shall be assumed and discharged by it without prejudice to the rights of third parties, provided that the management and control of the property and affairs of the present hospital system shall continue in the Board of Managers of such system until appointment and organization of the Board of Managers of the Hospital District, at which time the Board of Managers of the present hospital system shall turn over all records, property and affairs of said hospital system to the Board of Managers of the Hospital District and shall cease to exist as a hospital system Board of Managers.

Any outstanding bonded indebtedness incurred by the city or county, either or both of them, in the acquisition of such lands, buildings and equipment, or in the construction and equipping of such hospital facilities, together with any other outstanding bonds issued by either of them for hospital purposes, and the proceeds of which are in whole or in part still unspent, shall be assumed by the Hospital District and become the obligation of the Hospital District; and the city or county, either or both of them, that issued such bonds, shall be by the Hospital District relieved of any further liability for the payment thereof, or for providing interest and sinking fund requirements thereon; provided that nothing herein contained shall limit or affect any of the rights of any of the holders of such bonds against the city or the county, as the

case may be, in the event of default in the payment of the principal or interest on any of such bonds in accordance with their respective terms.

The Commissioners Court and the city, where a hospital or hospital system is jointly operated, or the Commissioners Court, where the county owns the hospital or hospital system, as the case may be, as soon as the Hospital District is created and authorized at the election hereinabove provided, and there have been appointed and qualified the Board of Hospital Managers hereinafter provided for, shall execute and deliver to the Hospital District, to wit: to its said Board of Hospital Managers, an instrument in writing conveying to said Hospital District the hospital property, including lands, buildings and equipment; and shall transfer to said Hospital District the funds hereinabove provided to become vested in the Hospital District, upon being furnished the certificate of the Chairman of the Board to the fact that a depository for the District's funds has been selected and has qualified; which funds shall, in the hands of the Hospital District and of its Board of Hospital Managers, be used for all or any of the same purposes as, and for no other purposes than, the purposes for which the county or the city transferring such funds could lawfully have used the same had they remained the property and funds of such county or city.

Board of Hospital Managers

Sec. 5. The Commissioners Court shall appoint a Board of Hospital Managers, consisting of not less than five (5) nor more than seven (7) members, who shall serve for a term of two (2) years, with overlapping terms if desired, and with initial appointments to terms of office arranged accordingly, without pay, and whose duties shall be to manage, control and administer the hospital or hospital system of the Hospital District. The Board of Managers shall have the power and authority to sue and be sued and to promulgate rules and regulations for the operation of the hospital or hospital system.

The Board shall appoint a general manager, to be known as the Administrator of the Hospital District. The Adminis-

trator shall hold office for a term not exceeding two (2) years, and shall receive such compensation as may be fixed by the Board. The Administrator shall be subject to removal at any time by the Board. The Administrator shall, before entering into the discharge of his duties, execute a bond payable to the District, in the amount of not less than Ten Thousand Dollars ($10,000), conditioned that he shall well and faithfully perform the duties required of him, and containing such other conditions as the Board may require. The administrator shall perform all duties which may be required of him by the Board, and shall supervise all of the work and activities of the District, and have general direction of the affairs of the District, within such limitations as may be prescribed by the Board. He shall be a person qualified by training and experience for the position of Administrator.

The Board of Managers shall have the authority to appoint to the staff such doctors and to employ such technicians, nurses and other employees of every kind and character as may be deemed advisable for the efficient operation of the hospital or hospital system; provided that no contract or term of employment shall exceed the period of two (2) years.

The Board of Managers, with the approval of the Commissioners Court shall be authorized to contract with any county for care and treatment of such county's sick, diseased and injured persons, and with the State and agencies of the Federal Government for the care and treatment of such persons for whom the State and such agencies of the Federal Government are responsible. Further, under the same conditions, the Board of Managers may enter into such contracts with the State and Federal Government as may be necessary to establish or continue a retirement program for the benefit of its employees.

If care or treatment is given to a resident of a county outside the Hospital District which has not contracted with the Board of Managers for such services, and said nonresident is wholly without financial means except such as are derived from charity, that County shall, upon presen-

tation of a certified statement that care or treatment was necessary for the preservation of human life and was actually performed, be obligated to reimburse the Hospital District in an amount not to exceed the actual cost of the service rendered.

A majority of the Board of Hospital Managers shall constitute a quorum for the transaction of any business. From among its members, the Board shall choose a Chairman, who shall preside; or in his absence a Chairman pro tempore shall preside; and the Administrator or any member of the Board may be appointed Secretary. The Board shall require the Secretary to keep suitable records of all proceedings of each meeting of the Board. Such record shall be read and signed after each meeting by the Chairman or the member presiding, and attested by the Secretary. The Board shall have a seal, on which shall be engraved the name of the Hospital District; and said seal shall be kept by the Secretary and used in authentication of all acts of the Board.

Board of Hospital Managers in counties of 650,000 to 900,000

Sec. 5(a). Notwithstanding the provision of the preceding section, in counties containing a population of more than 650,000, but less than 900,000 according to the last preceding Federal Census, the Commissioners Court shall appoint a Board of Hospital Managers consisting of not less than five (5) nor more than fifteen (15) members who shall serve for a term of two years with overlapping terms if desired, and upon such conditions, and bearing such responsibilities and duties as otherwise set out within this section.

Sec. 5(a) amended by Acts 1981, 67th Leg., p. 589, ch. 237, § 118, eff. Sept. 1981.

Retirement system

Sec. 5a. The Board of Managers may in addition to retirement programs authorized by this Act establish such other

retirement program for the benefit of its employees as it deems necessary and advisable.

Cumulative powers

Sec. 5b. The Board of Managers, with the approval of the Commissioners Court, shall have the power:

(a) To construct, condemn and purchase, purchase and acquire, lease, add to, maintain, operate, develop and regulate, sell, exchange and convey any and all lands, property, property rights, equipment, hospital facilities and systems for the maintenance of hospitals, buildings, structures, and any and all other facilities and services the hospital district may require or may have available to sell, lease or exchange;

(b) To further effectuate such powers, the Board of Managers, with the approval of the Commissioners Court, may cooperate and contract with the United States government, the State of Texas, any municipality or other hospital district, or any department of those governing bodies, or with any privately owned or operated hospital, corporate or otherwise, which privately owned or operated hospital is situated in the hospital district; provided, in the opinion of the Board of Managers and of the Commissioners Court, such a contract is deemed expedient and advantageous to the hospital district under existing circumstances, and be for such fair and reasonable compensation and on such other terms and for such length of time as may be deemed to further and assist the hospital district in performing its duty to provide medical and hospital care to needy inhabitants of the county.

(c) This amendment to Chapter 266, Acts of the 53rd Legislature, Regular Session, as amended (Article 4494—n, Vernon's Annotated Civil Statutes as amended), shall be considered and construed as more specifically expressing certain existing powers and cumulatively granting certain other powers to hospital districts created or which may be created under such Act.

Powers of Commissioners Court; duties of district, county officers, employees or agents

Sec. 6. The Commissioners Court of any such county shall have the power to prescribe the method and manner of making purchases and expenditures by and for such Hospital District, and also shall be authorized to prescribe all accounting and control procedures, or may delegate any or all such powers to the Board of Managers of such District by the adoption of an appropriate resolution or order to that effect. The Hospital District shall pay all salaries and expenses necessarily incurred by the county or any of its officers and agents in performing any duties which may be prescribed or required under this section. It shall be the duty of any officer, employee or agent of such county to perform and carry out any function or service prescribed by the Commissioners Court hereunder.

Assistant to Administrator

Sec. 7. In the event of incapacity, absence or inability of the Administrator to discharge any of the duties required of him, the Board may designate an assistant to the Administrator to discharge any duties or functions required of the Administrator. Such assistant or other persons shall give such bond and have such limitations upon his authority as may be fixed by the order of the Board.

Reports of Administrator; budget

Sec. 8. Once each year, as soon as practicable after the close of the fiscal year, the Administrator of the Hospital District shall report to the Board of Managers, the Commissioners Court, the State Board of Health and the State Comptroller a full sworn statement of all moneys and choses in action received by such Administrator and how disbursed or otherwise disposed of. Such report shall show in detail the operations of the District for the term. Under the direction of the Board of Managers, he shall prepare an annual budget which shall be approved by the Board of Managers

and shall then be presented to the Commissioners Court for final approval. In like manner all budget revisions shall be subject to approval by the Commissioners Court.

Eminent domain

Sec. 9. A Hospital District organized in pursuance of this Act shall have the right and power of eminent domain for the purpose of acquiring by condemnation any and all property of any kind or character, real, personal or mixed, or any interest therein, including outright ownership of such property in fee simple absolute, within the boundaries of the said District, necessary or convenient to the exercise of the rights, powers, privileges and functions conferred upon it by this Act, in the manner provided by General Law with respect to condemnation; provided that the said District shall not be required to make deposits in the registry of the trial court of the sum required by Paragraph Numbered 2 in Article 3268, V.C.S., 1925, or to make the bond required therein. In condemnation proceedings being prosecuted by the said District, the District shall not be required to pay in advance or to give bond or other security for costs in the trial court, nor to give any bond otherwise required for the issuance of a temporary restraining order or a temporary injunction relating to a condemnation proceeding, nor to give bond for costs or for supersedeas on any appeal or writ of error proceeding to any Court of Appeals, or to the Supreme Court.

Sec. 9 amended by Acts 1981, 67th Leg., p. 788, ch. 291, § 60, eff. Sept. 1, 1981.

Depository for district; selection

Sec. 10. Within thirty (30) days after the appointment of the Board of Hospital Managers of any District created under this Act, the said Board shall select a depository for such District in the manner provided by law for the selection of county depositories, and such depository shall be the depository of such District for a period of two (2) years

thereafter, until its successor is selected and qualified. In the alternative, the Board may elect to use the depository theretofore selected by the county. The Board may extend any contract with a depository to the next month of October, and select a depository for a period of two (2) years thereafter.

Inspection of districts

Sec. 11. All Hospital Districts established or maintained under provisions of this Act shall be subject to inspection by any duly authorized representative of the State Board of Health[1] or any State Board of Charities (or Public Welfare) that may hereafter be created, and of the Commissioners Court of the county, and resident officers shall admit such representatives into all Hospital District facilities and give them access on demand to all records, reports, books, papers, and accounts pertaining to the Hospital District.

Legal representatives of district

Sec. 12. It shall be the duty of the County Attorney, District Attorney or Criminal District Attorney, as the case may be, charged with the duty of representing the county in civil matters, to represent the Hospital District in all legal matters; provided, however, that the Board of Hospital Managers shall be authorized at its discretion to employ additional legal counsel when the Board deems advisable.

The Hospital District shall contribute sufficient funds to the general fund of the county for the account of the budget of the County Attorney, District Attorney or Criminal District Attorney, as the case may be, to pay all additional salaries and expenses incurred by such officer in performing the duties required of him by such District.

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[1]State Board of Health abolished and Department of Health Resources created by Acts 1975, 64th Leg., ch. 323. See art. 4418g.

Medical and hospital care assumed by district; delinquent taxes owed to cities and counties

Sec. 13. No county that has been constituted a Hospital District, and no city therein, shall thereafter levy any tax for hospital purposes; and such Hospital District shall be deemed to have assumed full responsibility for the furnishing of medical and hospital care for the needy and indigent persons residing in said Hospital District from the date that taxes are collected for the Hospital District.

That portion of delinquent taxes owed cities and counties on levies for present city and county hospital systems under Acts 48th Legislature, 1943, Chapter 383, page 697,[1] shall continue to be paid to the Hospital District by the city and county as collected, and applied by the Hospital District to the purposes for which such taxes originally were levied.

Patients; inquiry as to ability to pay; liability of relatives

Sec. 14. Whenever a patient has been admitted to the facilities of the Hospital District from the county in which the District is situated, the Administrator shall cause inquiry to be made as to his circumstances, and of the relatives of such patient legally liable for his support. If he finds that such patient or said relatives are liable to pay for his care and treatment in whole or in part, an order shall be made directing such patient, or said relatives, to pay to the treasurer of the Hospital District for the support of such patient a specified sum per week, in proportion to their financial ability, but such sum shall not exceed the actual per capita cost of maintenance. The Administrator shall have power and authority to collect such sum from the estate of the patient, or his relatives legally liable for his support, in the manner provided by law for the collection of expenses of the last illness of a deceased person. If the Administrator finds that such patient or said relatives are not able to pay, either in whole or in part, for his care and treatment in such

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[1]Article 4494i.

hospital, the same shall become a charge upon the Hospital District. Sould there be a dispute as to the ability to pay, or doubt in the mind of the Administrator, the County Court shall hear and determine same, after calling witnesses, and shall make such order as may be proper, from which appeal shall lie to the District Court by either party to the dispute.

This Act shall apply to Hospital Districts created before the passage hereof, as well as to any such Districts hereafter created, and any such District created by election prior to the effective date of this Act is hereby validated, confirmed and ratified.

Donations, gifts and endowments for district

Sec. 15. Said Board of Managers of the Hospital District is authorized on behalf of said Hospital District to accept donations, gifts, and endowments for the Hospital District, to be held in trust and administered by the Board of Managers for such purposes and under such directions, limitations, and provisions as may be prescribed in writing by donor, not inconsistent with proper management and objects of Hospital District.

Acts 1953, 53rd Leg., p. 691, ch. 266. Amended by Acts 1955, 54th Leg., p. 715, ch. 257, § 1; Acts 1959, 56th Leg., p. 587, ch. 271, § 1; Acts 1963, 58th Leg., p. 496, ch. 181, § 1; Acts 1965, 59th Leg., p. 494, ch. 255, § 1; Acts 1967, 60th Leg., p. 34, ch. 15, § 1, eff. March 13, 1967; Acts 1967, 60th Leg., p. 1087, ch. 477, eff. Aug. 28, 1967; Acts 1971, 62nd Leg., p. 1902, ch. 568, § 1, eff. June 1, 1971; Acts 1973, 63rd Leg., p. 713, ch. 306, § 1, eff. Aug. 27, 1973; Acts 1975, 64th Leg., p. 1854, ch. 579, § 1, eff. Sept. 1, 1975.

FILED
NOV 22 1982
ALEXANDER L. STEVAS,
CLERK

NO. 82-446

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

DALLAS COUNTY HOSPITAL DISTRICT,
Petitioner,

VERSUS

DALLAS ASSOCIATION OF COMMUNITY ORGANIZATIONS FOR REFORM NOW, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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ATTORNEY FOR RESPONDENTS

ISSUES PRESENTED

I.

WHETHER A HOSPITAL OWNED AND OPERATED BY A GOVERNMENTAL SUBDIVISION FOR THE SOLE PURPOSE OF TREATING HUMAN ILLS, IS A PUBLIC FORUM AVAILABLE TO MEMBERS OF THE GENERAL PUBLIC TO EXERCISE THEIR RIGHTS UNDER THE FIRST AMENDMENT.

II.

WHETHER PETITIONER'S "NO SOLICITATION" RULE REGULATING SOLICITATION ON HOSPITAL PROPERTY VIOLATES THE FIRST AMENDMENT.

CERTIFICATE OF INTERESTED PARTIES

The undersigned attorneys of record for Dallas Association of Community Organizations for Reform Now, et al., certify that the following listed parties have an interest in the outcome of this case:

PARTIES:

1. Leon Gowans, Respondent.
   4218 Montie
   Dallas, Texas 75210

2. Scott Holladay, Respondent.
   4415 San Jacinto 4415 San Jacinto
   Dallas, Texas 75204

3. Dallas ACORN, Respondent.
   4415 San Jacinto
   Dallas, Texas 75204

4. Dallas County Hospital District, Petitioner.
   5201 Harry Hines Boulevard
   Dallas, Texas 75235

The undersigned counsel certify that the following attorneys have an interest in the outcome of this case on behalf of their respective clients:

FOR THE RESPONDENT:

1. Mr. Roger Albright
   and the firm of
   MULLINAX, WELLS, BAAB & CLOUTMAN, P.C.
   P.O. Box 47972
   Dallas, Texas 75247

FOR THE PETITIONER:

1. **Mr. Earl Luna**
   and the law offices of
   EARL LUNA, P.C.
   2416 LTV Tower
   Dallas, Texas 75201

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NO. 82-446

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1981

DALLAS COUNTY HOSPITAL DISTRICT,
Petitioner,

Versus

DALLAS ASSOCIATION OF COMMUNITY ORGANIZATIONS FOR REFORM NOW, ET AL.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINION BELOW

The opinion of the Court of Appeals (Petitioner's Appendix A) is reported at 670 F.2d 629.

JURISDICTION

The Judgment sought to be reviewed was entered by the United States Court of Appeals for the Fifth Circuit on March 19, 1982, and is reported at 670 F.2d 629. Petitioner's motion for rehearing and suggestion for rehearing en banc

were denied on June 18, 1982. Petition for certiorari was filed within ninety days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment to the Constitution of the United States (Petitioner's Appendix F).

Article 4494n, Vernon's Annotated Texas Statutes (Petitioner's Appendix G).

STATEMENT OF THE CASE

In January, 1979, Plaintiffs filed their Complaint seeking injunctive relief from the enforcement of Defendant's "no solicitation" rule, which prohibited Plaintiffs from distributing informational leaflets related to health care issues on Parkland Premises.

Plaintiffs contend that portions of the Parkland Hospital premises were public forums suitable for protected First Amendment activities subject to reasonable time, place, and manner restrictions. Further, Plaintiffs asserted that the Defendant's "no solicitation" rule operated as a blanket ban on all First Amendment activities and allowed the administrator of the Defendant to selectively permit or prohibit First Amendment activity on the basis of its content and subject matter in an arbitrary, uncontrolled fashion.

Parkland Memorial Hospital, (Parkland), in Dallas, Texas, is owned and operated by Defendant Dallas County Hospital District. Various portions of Parkland are used for emergency

care, inpatient hospital care and outpatient care. The Outpatient Clinic is a five story annex to the main part of the hospital, and is entirely separate from the main portion of the hospital. The clinic provides medical care to patients who are ambulatory, which means that they are well enough to walk in, receive care, and walk out. Parkland is the primary source of health care for the indigent in Dallas County, Texas.

Plaintiff ACORN is an organization of low to moderate income families which operates through neighborhood groups to promote social and economic changes. One of the issues which ACORN addresses is the quality of health care for the indigent population. ACORN prepared leaflets addressing the deficiency in the delivery of outpatient health care at Parkland and the method whereby such deficiencies could be remedied. On Saturday, September 2, 1978, ACORN members entered the main lobby of Parkland to read the leaflet identified as Plaintiff's Exhibit 3. This event was covered by local news media as were other newsworthy events at Parkland. On September 11, 1978, ACORN members attempted to distribute the second leaflet, Plaintiff's Exhibit 4, to persons in the outpatient waiting areas. On both occasions Plaintiffs peacefully left when asked to do so by Defendant's security officials.

Defendant maintained a "no solicitation" rule which reads,

> For the protection of our employees and patients, solicitation of any kind on hospital premises is prohibited without prior written approval of the Hospital Administrator.

The Administrator uses the following definition of solicitation in enforcing the rule: "Solicitation means to accost, to influence to do evil, to agitate and create anxiety".

The Parkland premises cover twenty three acres, including streets, sidewalks, and parking lots used by staff, patrons and visitors. The Outpatient Clinic waiting area contains posters, pamphlets, magazines and newspapers, and no attempt is made to screen the type or content of the periodicals, or restrict the dissemination of newspapers, even when they contain derogatory news stories concerning Parkland.

Defendant's Board of Managers voluntarily meets monthly in the auditorium located on the first floor of Parkland. Inpatients and outpatients are allowed to attend these meetings, as are members of the general public such as ACORN members and the news media. These meetings often include discussion of controversial issues related to the operation of Parkland and the rendition of health care to the indigent. Although Plaintiff has never attempted to distribute leaflets at such a meeting, Defendant has indicated that such distribution would not be allowed without content control.

The District Court entered Judgment for Defendant on November 8, 1979, holding that although Plaintiff's conduct was protected by the First Amendment, Parkland was not a public forum and that the nature of Plaintiff's leafletting activity and the contents of those leaflets were incompatible with the activities of the hospital. On September 25, 1981, a panel of the United States Court of Appeals for the Fifth Circuit affirmed the trial court opinion holding that conditions at Parkland warranted the implementation of a blanket ban on First Amendment activities in all parts of the hospital premises, and that such congested conditions removed any need to address the vagueness or overbreadth of the Defendant's "no solicitation" rule or its discriminatory, content-based application.

In response to ACORN's Suggestion for Rehearing En Banc, a majority of the panel modified its prior opinion,

holding that Parkland is a public forum, whose use may be limited by reasonable time, place and manner restrictions and that the First Amendment was violated by unreasonable and unequal restrictions on access to public property, as well as by the delegation of authority to a single person to determine who may use public property for free speech, such as was done by the Defendant through its "no solicitation" rule.

REASONS FOR DENYING THE PETITION

Petitioner Parkland asserts that the decision of the Court of Appeals should be reviewed by this Court to resolve the conflict existing in lower courts on whether a hospital, owned and operated by a governmental subdivision for the sole purpose of treating of human ills, is a public forum. A careful reading of the Court of Appeals decision reveals, however, that such purportedly conflicting issue was not the issue addressed by the Court below, and that no conflict exists between the holding of the Panel below and the established law of this Court or the other Circuit Courts.

1. THE HOLDING OF THE FIFTH CIRCUIT WITH REGARD TO THE ISSUE OF THE PUBLIC FORUM IS NOT IN CONFLICT WITH OTHER CIRCUIT COURTS OR THE SUPREME COURT OF THE UNITED STATES.

Although the Fifth Circuit did indeed hold portions of Parkland Hospital to be "a limited public forum", (670 F.2d at 630, 631), such a decision is not in conflict with the decisions of other Appellate Courts cited by the Petitioner, nor is it in conflict with the settled principles of First Amendment law announced by this Court.

In accordance with established precedents, the Panel, citing *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51,

89 S.Ct. 935, 938-39, 22 L.Ed.2d 162, 167 (1969), finds that "the First Amendment is violated by unreasonable and unequal restrictions on access to public property, as well as by the delegation of authority to a single person to determine who may use public property for free speech". (670 F.2d at 632). Nevertheless, the Court holds that "what may be forbidden is expression that interferes with the functioning of the hospital", (670 F.2d at 632), and that "obviously, regulations must exist so that the primary purpose of a medical facility must be fulfilled and not impeded, . . . " Further, the decision of the Fifth Circuit is even more restrictive than required under the present case law of this Court, holding that "the central question would be 'whether the manner (and, we add, content) of expression is basically incompatible with the normal activity of a particular place at a particular time.'" *Greer v. Spock,* 424 U.S. 828, 843, 96 S.Ct. 1211, 1220, 47 L.Ed.2d 505, 517-18 (Powell, J., concurring) (quoting *Grayned v. City of Rockford,* 408 U.S. 104, 116, 92 S.Ct. 2294, 2303, 33 L.Ed.2d 222, 232, (1972)); see id. at 840, 96 S.Ct. at 1218, 47 L.Ed.2d at 515 (majority opinion)." (670 F.2d at 631, n.2).

The panel in no way held that the mere fact that a hospital is owned and operated by a governmental subdivision created a public forum for all purposes. Rather, the panel, recognized that the Parkland premises cover twenty three acres, including over a thousand feet of sidewalks, and several large parking lots and streets. These streets and sidewalks do not differ in form or function from those which were before the Court in *Hague v. Committee for Industrial Organization,* 307 U.S. 496, 515, 59 S.Ct. 954, 964 (1939), in which Justice Roberts, originating the modern public forum doctrine, held:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for

purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

Likewise, the Panel acknowledged that the "testimony by the Administrator indicated that newspapers and pamphlets from groups other than ACORN are permitted to be placed in the hospital on the basis that they are unlikely to cause anxiety to patients when sold in various parts of the hospital or placed in the reading rack in the out-patient waiting room". (670 F.2d at 631).

The panel, recognizing that "a valid time, place, and manner must also 'serve a significant governmental interest' *Virginia Board of Citizens Council,* 445 U.S. 771, L.Ed.2d 345, 96 S.Ct. 1817 (1976)" *Heffron v. International Society for Krishna Consciousness,* 452 U.S. 640, 307, 100 S.Ct. 2559, 69 L.Ed.2d 298, (1981), merely held that "a public hospital's rules should set forth standards that allow some freedom of expression outside patient areas, for example, on the sidewalks and in the parking lots, that would cause little harm or disturbance to the hospital's operation." (670 F.2d at 632). Thus, while the panel reaffirmed the "principle that the board of a hospital, operating public property devoted to a particular purpose, may adopt rules to preserve the property for the use for which it is lawfully dedicated", (670 F.2d at 632), they struck down the hospital's "no solicitation" rule as vague, overbroad, content-based and without standards.

A rule such as Defendant's in the context of hospitals is precisely the type of broad prohibition which the Supreme Court found to be invalid in *NLRB v. Baptist Hospital, Inc.,* 422 U.S. 773, 92 S.Ct. 2598 61 L.Ed.2d 251 (1979) and *Beth Israel Hospital v. NLRB,* 437 U.S. 483, 98 S.Ct. 2463,

57 L.Ed2d 370 (1978).

Specifically, the Court in *NLRB v. Baptist Hospital,* supra, at 787-788 stated:

> ". . . experience in cases such as *Beth Israel* and the present one makes clear that solicitation in at least some of the public areas of hospitals often will not adversely affect patient care and disturb patients.

As noted by the Court these union solicitation cases were decided pursuant to the rights and liabilities created by the National Labor Relations Act and,

> Under the Act, the task of the Board, subject to review by the Courts, is to resolve conflicts between Section 7 rights and private property rights, "and to seek a proper accommodation between the two". The task of the Board and the reviewing courts under the Act, therefore, stands in conspicuous contrast to the duty of the Court in applying the standards of the First Amendment, which requires "above all else that expression must not be restricted by government because of its message, its ideas, its subject matter, or its content".

Hudgens v. NLRB, 424 U.S. 507, 47 L.Ed.2d 196, 96 S.Ct. 1029 (1976) citing, *Central Hardware Co. v. NLRB,* 407 U.S. 539, 33 L.Ed.2d 122, 92 S.Ct. 2238. Thus the standards to be applied to Parkland, pursuant to First Amendment analysis, are even more stringent than those applied by this Court in the context of union solicitation.

The Defendant made no showing that Plaintiff's conduct creates a "material and substantial interference . . . or involves substantial disorder and invasion of the rights of others" which would justify a total on Plaintiff's activities in all

parts of the hospital premises. *Tinker v. Des Moines Independent School District,* 393 U.S. 503 at 513, 21 L.Ed.2d 731, 89 S.Ct. 733 (1969). There has been, and can be, no showing of a basic incompatibility between the silent leafletting of a limited number of persons on the sidewalks and streets of Parkland leading to the boundaries of those premises and the activities of Parkland conducted within the hospital portions of those premises.

The panel below recognized its duty to determine whether the "no solicitation" rule serves a significant governmental interest, and whether that interest can be served by less intrusive restrictions. See *Heffron, supra,* 452 U.S. 640, 69 L.Ed. 307-308, 310, 311, and held that "Parkland 'may serve its legitimate interests, but it must do so by narrowly drawn regulations designed to serve those interests without necessarily interfering with First Amendment freedom . . . Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone . . .'" *Village of Schaumburg v. Citizens for a Better Environment,* 444 U.S. 620 at 667, 63 L.Ed.2d 73, 100 S.Ct. 826 quoting *NAACP v. Button,* 371 U.S. 417, 438 9 L.Ed.2d 405, 83 S.Ct. 328 (1963)". See also *Grayned v. City of Rockford,* 408 U.S. 104, 116-117, 33 L.Ed.2d 222, 92 S.Ct. 2294 (1972).

The Defendant thus operates large, varied premises which include portions which are traditional public forums and other portions which the Defendant, through the conduct set forth hereinabove, has opened up as a public forum. Nevertheless, the Defendant has limited "the use of a forum to people whose views it finds acceptable, but [denying] use to those wishing to express less favored or more controversial views . . . [i]t may not select which issues are worth discussing or debating in public facilities. There is an equality in status of the field of ideas and government must afford all points of view an equal opportunity to be heard. Once the forum is

opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say." *Police Department of Chicago v. Moseley*, 408 U.S. 92, 33 L.Ed.2d 212, 92 S.Ct. 2286 (1972).

Even the Petitioner, citing *Clifford v. Moritz*, 472 F.Supp. 1094 (S.D. Oh., 1979) acknowledges that "if the public entity opens the hospital up as a limited public forum, it must do so on a nondiscriminatory basis . . . [and that] . . . a selective exclusion from a public place required a substantial if not compelling justification" (Petition for Writ page 19). Given the fact that Parkland has opened up its facilities for public board meetings and every would-be magazine salesman and pamphleteer, it cannot now selectively exclude the Plaintiff's protected expression merely because it dislikes the message.

2. THE PETITIONER'S "NO SOLICITATION" RULE VIOLATES THE FIRST AMENDMENT AND MUST BE STRUCK DOWN REGARDLESS OF THE DETERMINATION OF THE PUBLIC FORUM ISSUE.

Likewise, the Petitioner, in claiming that "if Parkland is not a public forum, the 'no solicitation' rule is clearly constitutional" and citing *Greer v. Spock*, in support of such a bold statement, clearly misunderstands the recent pronouncements of this Court. As the Court stated in *U.S. Postal Service v. Council of Greenburg Civic Association*, 453 U.S. 114, 69 L.Ed.2d 517, 101 S.Ct. 2676 (1981) at note 7,

> The First Amendment prohibits Congress from "abridging freedom of speech, or of the press," and its ramifications are not confined to the public forum first noted in *Hague v. CIO*, 307 U.S. 496, 83 L.Ed. 1423, 59 S.Ct. 954 (1939). What we hold is the principle reiterated by cases such as *Adderley v. State of Florida*, 385 U.S. 39,

17 L.Ed. 2nd 149, 87 S.Ct. 242, (1966), and *Greer v. Spock, supra,* that property owned or controlled by the government which is not a public forum may be subject to a prohibition of speech, leafletting, picketing, or other forms of communication without running afoul of the First Amendment. Admittedly, the government must act reasonably in imposing such restrictions, *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 130-131, 53 L.Ed.2d 629, 97 S.Ct. 2532 (1977), and a prohibition must be content neutral.

Although Defendant's "no solicitation" rule on its face did not address content or subject matter, it is enforced on the basis of content. The Administrator entrusted with the approval of solicitations under the Defendant's "no solicitation" rule, testified that he would not approve Plaintiff's leaflets since he thinks, "there are some misstatements here" (Record page 133). The "misstatements" consist of Plaintiff's position on the public issue of neighborhood health care clinics.

The fact that the Administrator was solely concerned with preventing criticism of Parkland rather than preventing a supposed anxiety-creating environment for patients is underscored by the manner in which the existing periodical racks in the waiting rooms are maintained and controlled. As noted by the Panel below, the Administrator testified that he did not know what kind of periodicals were placed on the periodical racks, how they got there, who furnished them, and that no one screened the periodicals to determine their appropriateness before authorizing their placement on the racks in the waiting areas. Nevertheless, despite this total disregard for the type or content of materials made available to occupants of the waiting room, the Administrator asserts that publications could not be put there unless he determined them to be "relevant" and "factually correct" (Record page 113-114).

Such restrictions are exactly the type of arbitrary discretion vested in some governmental authority which the Supreme Court has "condemned as inherently inconsistent with a valid time, place and manner regulation because such discretion has a potential for becoming a means of suppressing a particular point of view. [cites omitted]". *Heffron, supra.* For example, the Board of Managers of Defendant, Parkland, holds their monthly board meetings in the first floor auditorium of Parkland Hospital, since "the auditorium is probably the most accessible place in the hospital for people to come to and that is why the meetings are here" (Record page 98). "It is the place that would least disrupt any kind of activity going on in the hospital" (Record page 99). Nevertheless, Defendant asserts that approval of distribution of even content-approved leaflets by individuals standing outside the door of the Parkland auditorium, addressing the same issues raised in the public board meetings, would "depend on the leaflet" (Record page 125). Such an excessive delegation of unfettered discretion has the effect "to empower a single official to inconvenience and disorder. By such devices official authority can become an instrument of arbitrary suppression of opinion on public questions'." *Wolin v. Port of New York Authority,* 392 F.2d 82 (1968) citing *Cox v. State of Louisiana,* 379 U.S. 559, 95 S.Ct. 476, 13 L.Ed.2d 487 (1965).

If, as here, either the enactment or the enforcement of the "no solicitation" rule is based in any way "on the content of the speech or message, that action must be scrutinized more carefully to ensure that communication has not been prohibited 'merely because public officials disapprove the speaker's view'. *Consolidated Edison Company v. Public Service Commission,* 447 U.S. 530, 65 L.Ed.2d 319, 100 S.Ct. 2326 (1980)", *U.S. Postal Service, supra,* at 132.

The Petitioner with its shrill claim that the decision of the panel must be overturned "in order to prevent irreparable

damage to our health care institutions" (Petition for Writ page 201), grossly exaggerates the effects of the panel's decision on either Parkland or any other hospital. As the panel held, "Parkland need not allow disruption of the hospital or interference with patient care—by proper rules, with fixed standards, such disruption can be forbidden". (670 F.2d at 632). What the panel strikes down is the present rule which they find to be unconstitutionally vague and overbroad, and which contains no time, place or manner restrictions nor any definition by objective standards of the literature that may be forbidden because of potential interference of the hospital's administration, and which is applied by the hospital Administrator at his sole discretion.

With regard to the unconstitutional vagueness, the panel holds that as written "the present 'no solicitation' rule at Parkland is not vague—no solicitation at all is permitted, but that in application, it is clear that some literature is allowed on the premises of Parkland. Thus the rule becomes vague because those seeking to place their literature or leaflets in the waiting rooms of the hospital have no idea whether their expressions constitute 'solicitation' under the 'no solicitation' rule". (670 F.2d at 635).

The Administrator testified that the board had not defined the term "solicit" but that he used the following definition of solicitation in enforcing the "no solicitation" rule: "solicitation means to accost, to influence to do evil, to agitate and create anxiety" (Record page 62-63). When asked how the public would know what activities were included under the rule, the Administrator testified that he would "assume they had read the dictionary" (Record page 64). Such a standard is no standard at all. Rather, it gives the hospital Administrator the unbridled discretion to determine the type and content of solicitation that would "accost", "influence to do evil", or "agitate and create anxiety". As this Court has said in

Shuttlesworth v. Birmingham, supra,

> it is settled by a long line of recent decisions of this Court that an ordinance which, like this one, makes the peaceful enjoyment of freedoms which the constitution guarantees contingent upon the uncontrolled will of an official . . . is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms. *Staub v. Baxley,* 355 U.S. 313, 322, 2 L.Ed.2d 302-311, 78 S.Ct. 277 (1958).

The underlying chilling effect which such an uncertain standard will have on the exercise of First Amendment rights is underscored by the inability of the successive hospital administrators to reach reconcilable results concerning Plaintiff's publications and the "no solicitation" rule. In response to questioning about the standards under which "solicitations" would be approved or refused, the former administrator testified that "it (the solicitation) would be judged on its individual merits in accord with what was requested. I do not know how much more specific I can be about that" (Record page 223).

Apparently using that standard, the former administrator determined that the second leaflet (Plaintiff's Exhibit 4) "would be acceptable and we would have posted it" (Record page 224). However, in response to a similar question about the same leaflet even being placed in Parkland Hospital, the current Administrator determined the leaflet to be "inappropriate in our facility (since) I think we do deliver decent health care" (Record page 108). Clearly, the "no solicitation" rule is enforced by the subjective whim of the Administrator rather than by an objective, defined standard. As the Supreme Court has stated in *Grayned v. City of Rockford, supra,* at 108,

> It is a basic principle of due process that an enactment

is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, juries and judges for resolution on an *ad hoc* and subjective basis with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms. [footnotes omitted].

Likewise, the panel finds that "the 'no solicitation' rule is also overbroad in that it potentially reaches and restricts every single mode of expression, including pure speech." (670 F.2d at 633). In response to a question as to whether a patient sitting in the pharmacy waiting room would be prevented by the "no solicitation" rule from standing up and saying to fellow patients, "let's go address the Board of Managers" (Record 243-244), the Chairman of the Board of Managers testified that, "the solicitation policy is intended . . . to prevent . . . patients from being disturbed . . . and such a hypothetical thing as you were talking about would be most disturbing and I would hope that employees and others on the staff would go over to that person and try to quiet him down to stop such a disturbance" (Record 245-246).

Once a protected interest in speech has been found as has been done by the Trial Court and the Court of Appeals

below, it is incumbent upon the Defendant to prove that there is a compelling state interest in the total ban of the protected speech and that nothing less than a total ban would meet this compelling state interest, *Lovell v. Griffin,* 303 U.S. 444, 82 L.Ed. 949, 58 S.Ct. 666 (1938), *Cox v. Louisiana,* 379 U.S. 559, 95 S.Ct. 476 13 L.Ed.2d 487 (1965). This, the Defendant has not done. Rather, "even expressions that could in no way disrupt the purposes of the hospital could be prohibited under the rule if they were determined by the hospital administrator to constitute solicitation" *(Dallas Ass'n., Etc., supra,* 670 F.2d at 633).

Clearly, the present posture of this action does not warrant review by this Court at the present time. The Panel below has not created far reaching, First Amendment law on an issue of first impression in that or any other Circuit, but rather has merely remanded this matter to the District Court to develop a very restrictive rule in accordance with its finding that "ACORN activities including solicitation or the distribution of leaflets, are incompatible with the primary activities of all areas where patient care is being administered." (670 F.2d at 633). As the panel stated, "we are not chastising Parkland for its sensitivity to patient needs, but we are, under clearly established constitutional principles, requiring that standards must be set forth that are consistent with both patient needs and freedom of expression. Moreover, some machinery for review must exist so that decisions by the administration as to what areas are susceptible to disruption might be challenged." (670 F.2d at 632, 633). Clearly, it would not be in the best interest of judicial economy for this Court to consider this action until such a rule had been enacted and a record regarding same established in the Courts below.

CONCLUSION

For the foregoing reasons, Respondents respectfully suggest that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit be refused.

Respectfully submitted,
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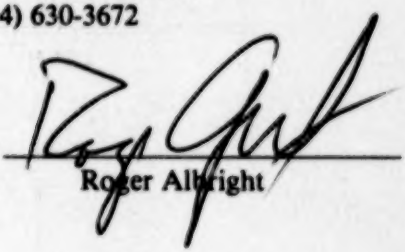
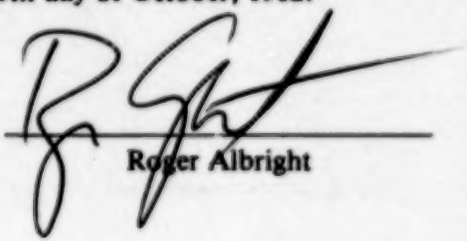
By 
Roger Albright

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Brief in Opposition to Petition for Writ of Certiorari has been served on the counsel for Petitioner, Mr. Earl Luna, at 2416 LTV Tower, 1525 Elm Street, Dallas, Texas 75201 by placing same in the United States Mail, postage prepaid, on this the 13th day of October, 1982.



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